(18)

No. 96-847-CFX
Status: GRANTED

Title: AT&T Family Federal Credit Union, et al., Petitioners
v.
First National Bank and Trust Co., et al.

Docketed:
December 2, 1996

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
96-843

Counsel for petitioner: Solicitor General

Counsel for respondent: Cohen,Louis R.

120296 counsel's office advised 1st petr corr as above

Entry	Date	Note	Proceedings and Orders
1	Nov 27 1996	G	Petition for writ of certiorari filed. (Response due December 30, 1996)
3	Dec 16 1996		Order extending time to file response to petition until December 30, 1996.
6	Dec 27 1996	X	Brief amicus curiae of National Association of Federal Credit Unions filed. VIDED.
4	Dec 30 1996		DISTRIBUTED. January 17, 1997 (Page 5)
5	Dec 30 1996	X	Brief of respondents First National Bank and Trust Co., et al. in opposition filed. VIDED.
9	Dec 30 1996		Brief amicus curiae of Consumer Federation of America filed. VIDED.
7	Jan 3 1997	X	Reply brief of petitioners AT & T Family Federal Credit Union, et al. filed.
10	Feb 10 1997		REDISTRIBUTED. February 14, 1997 (Page 53)
12	Feb 18 1997		REDISTRIBUTED. February 21, 1997 (Page 13)
13	Feb 24 1997		Petition GRANTED. SET FOR ARGUMENT October 6, 1997. **********
15	Mar 28 1997		Order extending time to file brief of petitioner on the merits until May 12, 1997.
16	Mar 28 1997		Order further extending time to file brief of respondent on the merits until July 11, 1997.
17	May 12 1997		Joint appendix filed. VIDED.
18	May 12 1997		Brief of petitioners AT&T Family Federal Credit Union, et al. filed. VIDED.
19	May 12 1997		Brief amicus curiae of National Association of Federal Credit Unions filed. VIDED.
20	May 12 1997		Brief amici curiae of Consumer Federation of America, Inc., et al. filed. VIDED.
21	May 12 1997		Brief amicus curiae of National Association of State Credit Union Supervisors filed. VIDED.
22	May 12 1997		Brief amici curiae of As Hoc Small Employers Group, et al. filed. VIDED.
23	May 12 1997		Brief of petitioner National Credit Union Administration filed. VIDED.
24	May 12 1997		LODGING consisting of one spiral bound copy of four publications submitted by Solicitor General. VIDED.
26	May 12 1997		Brief amicus curiae of California Credit Union League filed.

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No. 96-847-CFX

Entry	Date	Note	Proceedings and Orders
			VIDED.
27	Jul 11 1997		Brief amici curiae of Independent Bankers Association of America, et al. filed. VIDED.
28	Jul 11 1997		Brief of respondents First National Bank and Trust Co., et al. filed. VIDED.
29	Jul 24 1997	G	Motion of the Acting Solicitor General for divided argument filed.
30	Jul 28 1997		CIRCULATED.
31	Aug 11 1997	X	Reply brief of petitioner National Credit Union Administration filed. VIDED.
35	Aug 11 1997	X	Reply brief of petitioners AT&T Family Federal Credit Union, et al. filed.
33	Aug 14 1997		Record filed.
		*	Partial record proceedings United States District Court for the District of Columbia (2 BOXES).
32	Aug 22 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.
34	Sep 4 1997		LODGING. Twelve copies of Memorandum of FCA General Counsel, Legal Op. No. 754-A (Sept. 24, 1940).
36	Sep 12 1997		Motion of the Acting Solicitor General for divided argument GRANTED.
37	Oct 6 1997		ARGUED.

Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AT & T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court below err in conferring prudential standing under its "suitable challenger" test on banks to challenge the National Credit Union Administration's interpretation of the Federal Credit Union Act, after acknowledging that the interests Congress intended to protect in the Act were antithetical to the interests of banks and contrary to the Fourth Circuit's holding that banks did not have such standing because they were not within the "zone of interests" Congress intended to protect?

2. Did the court below err in invalidating the National Credit Union Administration's 1982 interpretation of the Federal Credit Union Act's "common bond" provision, which permits federal credit unions to consist of multiple unrelated employer groups?

LIST OF PARTIES

The parties below included the following:

The National Credit Union Administration ("NCUA"), defendant in the district court and appellee below, is the agency charged with administration and enforcement of the Federal Credit Union Act.

Lexington State Bank, Piedmont State Bank, Randolph Bank and Trust Company and *Bankers Trust of North Carolina* joined the *First National Bank and Trust Company* in bringing this action against NCUA, as did the *American Bankers Association*. These parties were plaintiffs in the district court and appellants below.

AT&T Family Federal Credit Union ("ATTF") is a corporation organized and existing under federal law pursuant to the Federal Credit Union Act. Its purpose is to promote thrift among its members and to create a source of credit for productive purposes. *Credit Union National Association, Inc.* ("CUNA") is a trade association consisting of fifty-one credit union leagues. Its purposes include the representation of the interests of credit unions with respect to legislative and regulatory matters. ATTF and CUNA (collectively, "CUNA") were permitted to intervene as defendants in the district court and were appellees below. They submitted briefs on both the standing issue and on the merits in the district court and the court of appeals. Neither ATTF nor CUNA have any parent companies or subsidiaries.

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AT&T Federal Credit Union and Credit Union National Association, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on standing is reported at 988 F.2d 1272 and is reprinted in the appendix hereto ("App.") at 25a. That court's opinion on the merits is reported at 90 F.3d 525 and is reprinted at App. 1a. The district court's opinions on standing and the merits are reported at 772 F. Supp. 609 and 863 F. Supp. 9, respectively, and reprinted at App. 40a and 13a, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 30, 1996. Petitioners' petition for rehearing and suggestion for rehearing *en banc* were denied on October 23, 1993. App. 50a and 52a. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The pertinent provisions of the Administrative Procedure Act, the Federal Credit Union Act, and the agency ruling at issue appear at App. 54a- 59a.

STATEMENT OF THE CASE

In this case, the plaintiff banks (the "Banks") challenged, under the Administrative Procedure Act ("APA"), the approval by the National Credit Union Administration ("NCUA") of certain amendments to the

charter of AT&T Family Federal Credit Union ("ATTF"). Their challenge placed in issue a 1982 interpretive ruling and policy statement of NCUA defining the scope of the "common bond" provision of Section 109 of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759 which regulates the membership of federal credit unions. As the court below expressly held, Congress' purpose in enacting the FCUA including the common bond provision was to promote the growth and viability of credit unions. NCUA effectuated that intent by setting forth a reasonable interpretation of the common bond provision which allows credit unions to consist of multiple unrelated employer groups, each with its own common bond.

The court of appeals, however, overturned the agency's interpretation through two decisions, each of which warrants this Court's review. First, notwithstanding the court's own recognition that the competitive interests of banks in weakening credit unions are antithetical to the interests that Congress intended to protect through the common bond provision, the court conferred standing on the Banks to enforce their preferred interpretation of that statute. The court, in a ruling that directly conflicts with the Fourth Circuit's resolution of the same issue, upheld the Banks' standing based on the D.C. Circuit's own untested "suitable challenger" doctrine -- an alternative route to standing created by that court for parties whose interests Congress did not intend to benefit. Second, relying on a 1927 dictionary definition that had not been urged on it by any party, and ignoring controlling precedent from this Court on the use of such sources, the court of appeals substituted its own interpretation of ambiguous statutory language for that of the agency entrusted to make such interpretations.

The court of appeals' ruling, if not reviewed by this Court, will have precisely the opposite effect from

that intended by Congress when it enacted the FCUA. The court's abrogation of NCUA's longstanding multiple group policy threatens to devastate the entire credit union industry by denying credit unions the opportunity to add new members and achieve member diversification necessary for their continued viability, and, if accorded the draconian effects urged by the Banks below, by dismembering thousands of credit unions throughout the Nation. The net result will be to make credit union services unavailable to millions of workers who now have access to them, thereby thwarting Congress' acknowledged goals in enacting the FCUA. Given the vital importance of this case for the entire credit union movement, the clear conflict in the circuits, and the conflicts between the court of appeals' decisions and this Court's precedents, certiorari is clearly warranted.

1. Federal Credit Unions And The Common Bond Provision

A credit union is a cooperative organization formed for the purpose of "promoting thrift among its members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752(1). Credit unions are distinctive in that the members of the credit union own and control the organization. 12 U.S.C. § 1757(6). Members purchase shares in the organization with their deposits and vote on such matters as election of directors, with each member receiving one vote regardless of number of shares. 12 U.S.C. §§ 1757(6), 1760. A credit union can also make loans and extend credit to its members and to other credit unions, but not to the general public. 12 U.S.C. § 1757(5). Deposits in federal credit unions are insured by the National Credit Union Share Insurance Fund.

Congress passed the FCUA in 1934, in the midst of the Great Depression, at a time when most individuals could not obtain loans at non-usurious interest rates and

had no organized method for saving. *See* S. Rep. No. 555, 72d Cong., 2d Sess. 2 (1934). Many states already permitted the chartering of credit unions under state law, but Congress believed this was inadequate. The Act was intended "[t]o establish a Federal Credit Union System * * * and to make more available to people of small means credit for provident purposes through a national system of cooperative credit * * *." Preamble to the Federal Credit Union Act, Pub. L. 73-467, 48 Stat. 1216 (1934).

The "common bond" provision of the FCUA is the focus of this action. It provides in relevant part that: "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district. 12 U.S.C. § 1759.

Congress included the common bond provision in the FCUA to encourage the effective and successful operation of credit unions. The court of appeals correctly concluded that Congress saw the common bond provision as "the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." App. 31a.[1/]

1/ In addition, Congress "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default." App. 31a. This also would contribute to the successful operation of the credit union.

This action involves the common bond of "occupation" described in Section 109. NCUA and its predecessors, as a matter of policy, have equated "occupation" with employment. Thus, most "occupational" credit unions were organized from among the employees of a particular company or other employer.

In 1982, NCUA adopted an interpretive ruling and policy statement (IRPS 82-1) permitting the granting of charters and charter amendments to credit unions that desired to serve multiple unrelated employer groups, where each group had its own common bond. 47 Fed. Reg. 16775 (1982), App. 57a. The court of appeals correctly concluded that this policy "was intended to enable each FCU [federal credit union] to realize economies of scale and to facilitate occupational diversification * * * and [make] it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU." App. 4a.

Over the past 14 years, NCUA's multiple group policy has been the primary engine for the growth in membership of federal credit unions. While relatively few new occupational credit unions have been formed since 1982 because of minimum size requirements and heavy start-up costs, about 3,500 federal credit unions have secured multiple group charters. These credit unions have absorbed about 156,000 employer groups and serve about 32 million individuals.

2. Proceedings Below

In 1990, eight years after NCUA had issued IRPS 82-1, five banks and the American Bankers Association (collectively, the "Banks") brought this action against NCUA challenging NCUA's approval of certain amendments to the charter of the ATTF. The Banks

claimed that these charter amendments violated the "common bond" requirement because there was not a single common bond uniting the members of all the groups.

ATTF and Credit Union National Association ("CUNA"), a trade association consisting of fifty-one credit union leagues, were permitted to intervene in the case as defendants on April 25, 1991.

On August 9, 1991, the district court dismissed the Banks' action on the ground that the Banks lacked prudential standing to challenge the NCUA actions at issue. App. 40a. The court utilized a two-part test for determining whether the banks were within the "zone of interest" of the common bond provision of the Federal Credit Union Act. First, the court determined that banks were not "intended beneficiaries" of the common bond provision. App. 47a. Second, the district court applied the D.C. Circuit's "suitable challenger" test which permits plaintiffs who are not intended beneficiaries of the statute in question nonetheless to sue if their interests merely "coincide" systematically with the interests which Congress *did* intend to protect. Using the test, the district court found that banks were not suitable challengers to agency decisions about the common bond provision, because "[T]he interests of banks will rarely, if ever, coincide with those of credit unions, the interest which Congress did intend to protect * * *." App. 47a.

The court of appeals reversed. App. 25a. The court of appeals agreed with the district court that "Congress did not, in 1934, intend to shield banks from competition from credit unions." App. 30a. To the contrary, the court found this notion "anomalous" because Congress' "general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." App. 30a.

The court of appeals then went on to consider what it described as the "more subtle" question whether banks could be considered "suitable challengers" to enforce the common bond provision. App. 31a. It concluded that the interests of banks were sufficiently congruent with the interests protected by the common bond provision for the court to allow the suit. The D.C. Circuit stated that it "cannot agree" with *Branch Bank & Trust Co. v. National Credit Union Admin.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), an identical case in which the Fourth Circuit ruled that banks lacked standing to challenge NCUA's interpretation of the common bond provision.

Following remand, the district court resolved the merits in favor of NCUA and the Intervenor Defendants. It held that the part of Section 109 that governed occupational credit unions was ambiguous and that NCUA's interpretation of it permitting credit unions to include multiple employer groups, each with its own common bond, was entitled to deference under the first step of the analysis set forth by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The plaintiffs had not even argued that they could prevail under the second step of the *Chevron* analysis if the statutory provision were found to be ambiguous, so the court granted summary judgment in favor of the defendants. App. 23a-24a.

The court of appeals again reversed. App. 1a. The court held that the language of the common bond provision unambiguously precluded NCUA's interpretation of it. The court also concluded that NCUA's interpretation frustrated the purpose of the provision because it diminished the cohesiveness among credit union members. The court of appeals subsequently denied defendants' petition for rehearing and suggestion for rehearing *en banc*. App. 50a and 52a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION ON STANDING CONFLICTS WITH THIS COURT'S PRECEDENTS AND HAS CREATED A CONFLICT IN THE CIRCUITS

In ruling that banks have standing to challenge the alleged failure of NCUA to abide by the "common bond" requirement, the court of appeals recognized that the interests of banks were *not* among those that the statute was intended to protect. Indeed, the court recognized that the statute, far from protecting banks from competition, had the directly contrary objective of fostering the continued growth and viability of credit unions. Nevertheless, the court granted the Banks standing based on its "suitable challenger" doctrine, an alternative route to standing of that court's own making. In so doing, however, the court disregarded this Court's precedents establishing that Congressional intent is the touchstone of the "zone of interests" standing inquiry, and created a conflict in the circuits on the precise issue presented in this case. Given the importance of the issue and the irreconcilable conflict among the circuits, this Court should grant review to decide whether the court of appeals properly extended this Court's standing jurisprudence to allow challenges by parties whose interests Congress did not intend to protect but who are, in the view of a particular judge, nevertheless "suitable challengers" of agency action.[2/]

2/ When we initially petitioned this Court for review of this question, the Solicitor General, while agreeing that the issue warranted this Court's review, contended that the petition was unripe because the lower courts had not yet ruled on the merits of

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A. The Court Should Decide The Validity Of The D.C. Circuit's "Suitable Challenger" Doctrine

There is no question that the court of appeals' ruling represents a marked departure from this Court's prudential standing jurisprudence. The court of appeals, rejecting the Banks' contrary argument, expressly recognized that banks "were not intended beneficiaries of the FCUA * * *." App. 25a. That is because "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." App. 30a. *See also* 31a ("we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks"). The court reiterated that holding in its subsequent opinion on the merits. App. 1a.[3/] In short, the court

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the Banks' contentions. The Solicitor General, however, noted that once the merits had been decided, "this Court would have the opportunity to review the standing question, as well as the question of the validity of the NCUA's interpretation of the Act, in a single proceeding." Brief for the Federal Respondent in Opposition, *AT&T Family Credit Union v. First National Bank & Trust Co.*, No. 92-2010. Thus, the standing issue is now plainly ripe for this Court's review.

3/ The legislative history of the FCUA, and of the District of Columbia law upon which it was modeled, clearly evidence that intent. *See, e.g.*, S. Rep. No. 555, 73d Cong., 2d Sess. 3 (Congress established federal credit union system to "bring normal-credit resources on a cooperative basis to the masses of the

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recognized that Congress' goal in enacting the FCUA and the common bond requirement -- ensuring the continued viability of credit unions so that they could serve customers disdained by banks -- is completely antithetical to the interests of the Banks in limiting competition from credit unions. That holding should have been sufficient (as the district court held, App. 40a) to conclude that the Banks' interests were not even arguably within the "zone of interests" protected by the statute, and therefore that they lacked standing to challenge NCUA's purported misapplication of it.

Nevertheless, the court of appeals held that the Banks had standing under that court's own "suitable challenger" doctrine. That doctrine, which finds its genesis in the D.C. Circuit's decisions in *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988) ("*HWTC II*"), *cert. denied*, 490 U.S. 1106 (1989), and *Hazardous Waste Treatment Council v. EPA*, 885 F.2d 918 (D.C. Cir. 1989) ("*HWTC IV*"), sets forth an alternative standing test for parties whose interests are not among those that Congress intended to benefit when

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people whose buying power is now so often dissipated in high rate interest charges"); *id.* at 3 (FCUA intended to foster "more rapid national development" of credit unions); 78 Cong. Rec. 7259, 12,224 (1934) (Congress believed that national credit union system would benefit "the masses of the people" by providing alternative to both banks and loan sharks); *Incorporation of Credit Unions: Hearings Before the Committee on the District of Columbia on S. 1153*, 72d Cong., 1st Sess. 14 (1932) (credit unions seen as alternatives to loan sharks); *id.* at 28 (credit unions would "bring out savings and concentrate savings in credit unions that would not, otherwise, find the banks * * *.") (statement of Sen. Gore).

it enacted the statute in question. Under this "more subtle" test (App. 31a), such parties may be accorded standing if their interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *HWTC IV*, 885 F.2d at 922. *See also HWTC II*, 861 F.2d at 283 ("In the absence of apparent congressional intent to benefit * * * there may still be standing if some factor -- some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect -- supports an inference that Congress would have intended eligibility."). The only apparent limitation on this new doctrine is that the interests of a "suitable challenger" must coincide "systematically, not fortuitously * * * with the interests of those whom Congress intended to protect." *HWTC IV*, 885 F.2d at 924.[4/]

As this case demonstrates, that limitation has little practical content. Conceding that the issue was "devilishly complex," App. 37a, the court of appeals applied its alternative "suitable challenger" test to uphold standing. The court held that even though the goals of the common bond provision were completely at odds with the competitive interests of Banks, "[t]here is * * * a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end." App. 36a. As the court further explained, "when the plaintiff seeks to enforce a statutory restriction on his

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4/ *See also HWTC II*, 861 F.2d at 283, 284 (standing will not exist where interests "coincide only accidentally" or bear only an "oblique relation to the statutory goal").

competition -- a restriction the plaintiff enjoys as well as the statutory beneficiaries -- there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme." App. 37a.

The D.C. Circuit's "suitable challenger" doctrine, while now firmly embedded in that court's jurisprudence, finds no support in this Court's precedents. In *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), this Court explained that standing will be permitted only where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute * * * in question." *Id.* at 153. Thus, in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), the Court explained that "[a]t bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Id.* at 400. And more recently, in *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991), this Court reiterated this longstanding test in denying standing to postal workers challenging an administrative decision under the Private Express Statute ("PES"). As the Court explained, to determine standing "[w]e must inquire, then, as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." *Id.* at 524. The Court denied standing because the specific statute in question evidenced no intent to benefit the interests of postal workers.5/

5/ *See also INS v. Legalization Assistance Project of the Los Angeles County Federation of Labor*, 114 S. Ct. 422, 424 (1993) (O'Connor, J., in chambers) (granting stay of district court

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As can be seen, this Court's precedents focus on whether the plaintiff's interests are within the zone of interests that Congress intended to protect. These precedents contain no alternative route to standing that examines whether a plaintiff's interests, although concededly not among those that Congress intended to protect, are nevertheless aligned in some way with the interests of the statute's actual beneficiaries so as to make that plaintiff, in the court's view if not that of Congress, a "suitable challenger." Indeed, Judge Wald dissented from the D.C. Circuit's original formulation of the doctrine and only reluctantly concurred in the judgment below, noting that the doctrine "is without roots either in Supreme Court law or in the general purposes of standing." App. 38a (Wald, J., concurring). *See also HWTC IV*, 885 F.2d at 930 (court's "rewriting of 'zone of interests' law is * * * fundamentally at odds with Supreme Court and current precedent") (Wald, C.J., dissenting). As Judge Wald explained, the "suitable challenger" doctrine requires "profound judgments about the overall suitability of diverse organizations or sprawling multinational corporations to challenge regulatory schemes, insisting we weigh the various ways in which the entity's interests are internally inconsistent or conflict with other groups who would be within the zone of interests. This is not an appropriate

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decision allowing standing where there was "no indication that [the statute] was in any way addressed to [the plaintiffs'] interest"); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (inquiry is whether congress "intended for [a] class [of plaintiffs] to be relied upon to challenge agency disregard of the law").

task for the courts." *HWTC IV*, 885 F.2d at 933 (Wald, C.J., dissenting).[6/]

The court of appeals purported to find authority for its "suitable challenger" doctrine in a single footnote in this Court's opinion in *Clarke*. App. 30a; *HWTC IV*, 885 F.2d at 922. In that footnote, the Court explained that the zone of interests inquiry "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 497 U.S. at 397 n.12. It is plain, however, that this footnote was merely describing the effect of this Court's zone of interests analysis, which "[a]t bottom * * * turns on congressional intent," *id.* at 400, and was not thereby creating a new, alternative route to standing for those whose interests are not among those Congress intended to protect. As Judge Wald noted below, this Court decided *Clarke* under its longstanding zone of interests jurisprudence, "not under any 'suitable challenger' test akin to that laid down in *HWTC IV*." App. 38a n.1 (Wald, J., dissenting). In this regard, it is notable that the Court, in its subsequent *Air Courier* decision, denied standing to the postal workers under its traditional inquiry into congressional intent -- without analyzing whether the workers, although their interests were not among those Congress intended to

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6/ In *HWTC IV*, Judge Wald believed that the suitable challenger doctrine was an unwarranted extension of this Court's precedents, but also believed that the plaintiff should have been accorded standing under this Court's zone of interests jurisprudence because Congress had intended to benefit its interests. As the present case makes clear, the D.C. Circuit's "suitable challenger" doctrine is in fact an alternative route to standing for parties who would otherwise not be accorded standing because their interests are not those which Congress intended to benefit.

protect, nevertheless possessed some characteristic that made them "suitable challengers."

Contrary to the reasoning of the court below (App. 29a-37a), its suitable challenger doctrine does not find general support in this Court's decisions upholding the standing of competitors in *Clarke*, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"), and *Data Processing*. Each of these cases arose under "entry restricting" statutes that were intended by Congress to limit the competitive reach of regulated firms. Thus, in *Clarke*, the Court held that the statute in question, the National Bank Act, was intended by Congress "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," 479 U.S. at 403, and therefore held that the banks' competitors were within the zone of interests protected by that statute. Likewise, in *ICI* and *Data Processing*, the Court upheld competitors' standing to challenge decisions under the Glass-Steagall Act, because in that statute "Congress had arguably legislated against the competition that [the plaintiffs sought] to challenge." *ICI*, 401 U.S. at 620. These decisions are thus plainly applications of the zone of interests test, not alternatives to it.

The APA contains "generous review provisions" and the zone of interests test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 395, 399. There is no need, therefore, to devise a new alternative to that test, a "more subtle" approach that the court below acknowledged was "devilishly complex" in application. App. 31a, 37a. Having recognized that the Banks' interests were not in any way among those that Congress intended to benefit, the court below should have dismissed this suit for lack of standing.

Instead, the decision below turns this Court's standing inquiry on its head. Whereas this Court has

inquired whether the plaintiff's interests are among those that Congress intended to benefit or protect, in this case the court of appeals conferred standing on entities with interests that the court itself held are completely *antithetical* to the interests Congress intended to protect. As the court of appeals recognized, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." App. 31a. Yet that same court allowed the Banks -- whose competitive interests are completely at odds with this statutory purpose of promoting "credit unions' continued success" -- to bring a challenge designed to cripple credit unions throughout the Nation. This Court explained in *Clarke* that the zone of interests test was intended to avoid just such a result -- "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." 479 U.S. at 397 n.12. The Court should not allow this potentially devastating result to occur without reviewing the unprecedented standing doctrine giving rise to it.7/

7/ The Banks seek an order compelling the NCUA "to cause all federal credit unions, notwithstanding any contrary past NCUA authorization, to reduce their existing membership" in light of the decision below -- *i.e.*, to expel members added over time pursuant to the multiple group policy. Amended Complaint for Declaratory and Injunctive Relief at 9 (filed Nov. 15 1996). Such an order -- which would be devastating to the ongoing viability of large numbers of credit unions -- is hardly consistent with the acknowledged legislative purpose of promoting the growth and strength of credit unions. The fact that the Banks would demand such relief confirms in the starkest possible terms that they seek "to frustrate [rather] than to further [the] statutory objectives," and that they are precisely the sort of plaintiffs the zone of interests test was designed "to exclude." *Clarke*, 479 U.S. at 397 n.12.

B. The Court Should Resolve The Conflict In The Circuits Over This Important Question

The court of appeals' decision on standing squarely conflicts with the decision of the Fourth Circuit in a case raising the identical issue. In *Branch Bank and Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), that court held that banks lacked standing to challenge the NCUA's alleged misinterpretation of the common bond requirement.

Like the court of appeals in this case, the Fourth Circuit recognized that the interests of banks were not among those that Congress intended to protect through the FCUA. Quite to the contrary,

> The federal credit union system was * * * established as an alternative to an unacceptable credit structure, a structure that included banks. Thus, the general purposes of the Act, rather than indicating a desire to protect banks, instead suggests that the competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited means. Absent any specific evidence to the contrary, it would be anomalous to conclude that the banks were somehow protected by this action.

Id. at 626.

And "[c]onsistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." *Id.*

But unlike the court below, the Fourth Circuit (per Judge Wilkinson) held that this evidence of congressional intent showed that banks were not in the zone of interests protected by the Act and therefore lacked standing to enforce their view of the common bond requirement:

> There is no evidence from any source cited to the court that Congress also intended by this provision to protect the competitive interests of banks. Given the specific rationale for the common bond requirement, we will not attribute to it a meaning that is at cross purposes with the general goals of the statute. If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position. *Id.*

The Fourth Circuit stressed the importance of adhering to the zone of interests limitation on standing, noting that the test "serves primarily to advance * * * separation of powers values." *Id.* at 624. As the court explained, basing standing on injury alone "would necessarily obstruct and undermine legislative control and guidance * * * by conferring standing on a host of parties whose interests Congress failed to protect." *Id.* The court noted that, in the legislative process, Congress necessarily decides to advance some interests and not others:

> Proper respect for the judgment of Congress * * * requires that some degree of finality be accorded its balancing of interests. * * * [T]he zone test dictates that parties left unprotected * * * by legislation must return to the legislative process if they

> are dissatisfied with its outcome. Absent some evidence that the interests of these parties are a subject of continuing concern in the statutory scheme, we will not allow them to reopen the legislative inquiry in a federal court.

Id. at 625.

That is, however, precisely the result of the new standing test applied by the D.C. Circuit in this case: the Banks -- whose interests Congress had no intention of protecting when it enacted the FCUA -- have nevertheless secured substantial protection from competition under the FCUA from the courts.

Neither the court below nor the Banks have disputed that the D.C. Circuit and the Fourth Circuit have reached diametrically opposed conclusions on the same issue. Rather, the Banks have argued that the Fourth Circuit's decision in *Branch Bank* was superseded by this Court's later decision in *Clarke*. The court below adopted this position, holding that "[t]he subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness." App. 33a n.3.

As explained above, however, this proposition finds no support in this Court's decision in *Clarke*. That opinion did not "explicat[e] * * * the suitable challenger route to standing." Rather, that new route was blazed by the D.C. Circuit itself. As noted, far from formulating an alternative standing doctrine for parties whose interests are antithetical to those Congress intended to protect, the Court in *Clarke* (and subsequently in *Air Courier*) reiterated that congressional intent to benefit is the touchstone of the zone of interests inquiry. *See supra*

at 12, 14. The Fourth Circuit has indicated no intent to reconsider its holding in *Branch Bank*, which remains the law of that Circuit. Simply put, one of these courts -- either the D.C. Circuit or the Fourth Circuit -- is in conflict with this Court's precedents. We believe that court is the D.C. Circuit, but that is a question that only this Court can resolve.

Moreover, the D.C. Circuit's "suitable challenger" doctrine, if not reviewed by this Court, will continue to have far-reaching effects. Indeed, since the decision on standing in this case, one other circuit has weighed in on the issue. In *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit recognized that "[t]he two courts that have addressed whether banks have standing to challenge charter provisions of credit unions under the [FCUA] have reached contrary results." *Id.* at 1054. The Sixth Circuit "enter[ed] the debate" and followed the D.C. Circuit in upholding the standing of banks as "suitable challengers" to the NCUA's purported misinterpretation of the common bond requirement. *Id.*

The Sixth Circuit, however, appeared to rest entirely on its belief that "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion," because, in its view, credit union members, other credit unions, and consumer protection groups lacked sufficient incentives to mount such challenges. *Id.* Not only is this assertion wrong as a factual matter, *see Casazza v. Department of Commerce*, 350 N.W.2d 855 (Mich. App. 1984) (credit union members brought suit to challenge alleged misapplication of state law common bond requirement), but it squarely conflicts with this Court's unambiguous holdings, *see, e.g.*,

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 227 (1974) ("[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing"). The Sixth Circuit's reasoning is arguably even more expansive than the D.C. Circuit's "suitable challenger" test, for it would allow standing to any party regardless of its connection (or lack of connection) to the interests Congress intended to protect, whenever a particular court believes that the intended beneficiaries would be unlikely to sue. Thus, the Sixth Circuit's decision, far from lending credence to the D.C. Circuit's ruling, has only engendered additional confusion regarding the issue.[8/]

II. THE COURT OF APPEALS ERRED IN ITS APPROACH UNDER THE *CHEVRON* DECISION

The court of appeals' decision invalidating NCUA's longstanding interpretation of the common bond provision likewise warrants this Court's review. The court relied largely on an analysis of the provision that was never advanced by the plaintiffs. To reach its conclusion that the provision was unambiguous, the court assigned a meaning to a word it regarded as critical to its interpretation. However, the very dictionary the court cited for the plain meaning of that word contained an

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8/ The Sixth Circuit is now considering the merits of the plaintiffs' argument that NCUA's multiple group policy contravenes Section 109 of the FCUA. *First City Bank v. National Credit Union Administration*, No. 95-6543.

alternative definition that undercuts the court's analysis. The court of appeals' conclusion that the provision can have only one meaning in this circumstance directly conflicts with this Court's teaching in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), which holds that a statute cannot be found unambiguous in light of such evidence.

The court of appeals also incorrectly concluded that its reading of Section 109 furthered Congressional intent. To the contrary, its construction is inconsistent with Congress' overriding and expressly-stated objective of making credit union services available to as many people as possible. NCUA's interpretation, on the other hand, furthers that objective while still preserving values Congress believed were protected by the common bond provision.

Because Section 109 does not speak unambiguously to the issue presented here, the court below should have deferred NCUA's reasonable interpretation of this provision. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

A. The "Occupational" Common Bond Provision Of Section 109 Is Ambiguous

Section 109 states in relevant part: "that Federal credit union membership shall be limited to groups having a common bond of occupation * * * or to groups within a well-defined neighborhood, community or rural district."

The plaintiffs argued to the court of appeals that the singular article "a" in the phrase "groups having a

common bond" means that Congress intended that all members of a credit union must share a single common bond. The NCUA and the Credit Union Intervenors argued in response that the plural "groups" in the same phrase contemplates that a credit union may consist of multiple groups provided each had its own common bond. The court of appeals rejected both arguments, which should have led to the conclusion that Section 109 is ambiguous. However, the court of appeals instead adopted an entirely different reading of Section 109 -- one that it regarded as plain even though it had not been suggested or briefed by either party.

The court stated that the common bond concept is already implicit in the ordinary meaning of the word "group." Therefore, the court reasoned, to give meaning to the phrase "having a common bond," it is necessary to require all the members of multiple groups to share the same common bond. Otherwise, the phrase would be surplusage. App. 6a-7a.

The only support the court provided for the assertion that "group" ordinarily implies commonality is the 1927 version of *Webster's New International Dictionary* that was current when the FCUA was passed in 1934. The court quoted from subpart 4 of the definition which referred to an "assemblage . . . having some resemblance or common characteristic." App. 6a. However, the degree of commonality reflected in that definition is minimal. The court correctly recognized elsewhere in its opinion that the common bond provision was designed to be the "cement that united credit union members in a cooperative venture." App. 3a. This sort of cohesiveness or "cement" is not implied in the court's chosen definition of the word "group."

As importantly, the court chose to ignore another meaning of "group" in the same dictionary that does not imply any commonality at all. Subpart 3 of the definition defines group merely as "An assemblage of persons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as, a *group* of trees or of islands." Subpart 3 is different from the subpart 4 definition in that it lacks the very element of commonality that the court believed was implicit in the word "group." The subpart 3 meaning does not imply any "resemblance or common characteristic" and certainly does not suggest the existence of any "cement" that would unite members in a "cooperative venture."

If Congress used "groups" consistent with the subpart 3 meaning, the phrase "having a common bond" is not surplusage at all. Indeed, the phrase is required to impart the concept of commonality that is otherwise lacking in the subpart 3 meaning of "group." If it is not surplusage, there is no basis for the court of appeals' conclusion that "having a common bond" requires that members of all groups share the same common bond.

In any event, the dual meaning of "group" precludes a *Chevron* step 1 conclusion that the statute can have only one meaning. If the plain language of the statute does not exclusively support the Banks' position, *Chevron* requires deference to NCUA's interpretation. This Court's decision in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992), is directly on point. There, the dispute turned on the meaning of the word "required" in the phrase "required for intercity rail passenger service." The ICC interpreted "required" broadly, to encompass the meaning "useful and appropriate." The court of appeals rejected the

ICC's interpretation saying that "required" meant indispensable or necessary. 503 U.S. at 416.

This Court reversed. It noted that Webster's Dictionary contained alternative definitions of the word "required," each making some sense under the statute. One of the definitions supported the agency's interpretation. The Court said that this fact itself indicated that the statute is "open to interpretation," mandating deference to the agency's interpretation under *Chevron*. 503 U.S. at 417.

The court of appeals' ruling plainly conflicts with this Court's express holding in *Boston & Maine*. As in that case, the dictionary definition relied on by the court of appeals contains alternative definitions, at least one of which supports the agency's interpretation. Accordingly, as in that case, the statute is "open to interpretation" and deference is warranted under *Chevron*. The court of appeals' marked departure from this Court's holding is plainly grounds for this Court's review.2/

2/ The court of appeals' decision cannot be sustained on the ground, relied on by the court as additional support for its holding, that another part of Section 109 limits membership in community-based credit unions to people in a single community. *See* App. 8a-9a. That provision, unlike the common bond provision, contains language requiring that members of a community-based credit union reside "within" the same community. The common bond provision contains no similar language requiring that members of an occupation-based credit union share the same common bond "within" the same company.

B. NCUA's Interpretation Is Consistent With Both The Overriding Purpose Of The Act And The Purpose Of The Common Bond Provision

The court of appeals erroneously concluded that NCUA's interpretation frustrates Congressional policy because it eliminates the cohesiveness of the credit union's members. App. 10a. However, the role of the common bond provision and NCUA's interpretation of it must be evaluated within the context of the broader objectives of the Act. When this is done, it is clear that NCUA's interpretation advances Congress' objectives.

The primary objective of the FCUA was to make credit union services available to more people. The Preamble to the FCUA itself provides that the purpose of the Act was "[t]o establish a Federal Credit Union System * * * and to make more available to people of small means credit for provident purposes * * *." Pub. L. 73-467, 48 Stat. 1216 (1934). NCUA's multiple group policy helps achieve this objective. As the court of appeals recognized, many employee groups are too small to meet NCUA's minimum number of potential members -- 500 -- for the establishment of a credit union. App. 4a. That is why most of the growth in federal credit union membership occurs as a result of NCUA's multiple group policy, which permits relatively small employee groups to band together to support a credit union.

The primary objective of the common bond provision of the FCUA was not to limit growth *per se* but to enhance the financial stability of credit unions. *See* pp. 4-5 *supra*. NCUA's multiple group policy furthers this goal by allowing credit unions to achieve member diversification and economies of scale. App. 4a.

These are measures that NCUA believes would assure the long-term viability of credit unions. *Id.*

There is no doubt that, as the court of appeals concluded, Congress also intended the common bond provision to help assure the success of federal credit unions by serving as "the cement that united credit union members in a cooperative venture." App. 3a. NCUA's interpretation preserves this value. Such a bond exists among the members of each employee group in the credit union. This bond assures that many of the credit union's members are known to each other and creates a sense of shared responsibility for the success of the credit union that discourages defaults. There is no reason for the Court to assume, contrary to the agency's considered judgment, that the overall amount of "cement" in a credit union consisting of a number of smaller groups is significantly less than the amount in one very large employer group with the same aggregate number of workers.

III. IMPORTANT QUESTIONS ARE RAISED WITH RESPECT TO BOTH STANDING AND THE MERITS

This case is of critical importance to the entire credit union industry and to the millions of workers who rely upon credit union services. By conferring standing on banks whose competitive interests are antithetical to the interests of credit union members that Congress intended to protect, and by invalidating a longstanding policy designed to ensure the continued growth and viability of credit unions, the court of appeals' ruling substantially and adversely impacts the entire federal credit union system.

The policy invalidated by the court of appeals has been the primary means for the growth in federal credit union membership since it was adopted in 1982. It has permitted approximately 3,500 credit unions, serving more than 32,000,000 members in about 156,000 employer groups, to diversify their membership base in a manner that protects the safety and soundness of the credit union system and the resources of the National Credit Union Share Insurance Fund. Without this policy, many credit unions may lack sufficient membership to remain financially viable. And without this policy, many thousands of current and prospective credit union members, who work for companies that are too small to sustain a credit union by themselves, will be deprived of needed access to credit union services. That result would thwart Congress' precise goals in enacting the FCUA, and should not be permitted to occur without this Court's review.

The relief sought by the Banks in response to the court of appeals' decision only serves to underscore the potentially devastating impact of that decision for credit unions throughout the Nation. Following remand to the district court, the American Bankers Association and two other banking associations commenced a new action seeking nationwide declaratory and injunctive relief enforcing the court of appeal's decision. They sought an order granting prospective relief that 1) bars NCUA from authorizing any federal credit union to add additional employer groups whose members do not share a single common bond with the credit union "core" group and 2) prevents credit unions from adding new members to all of the about 156,000 groups approved by NCUA since 1982 pursuant to its multiple group policy unless those new members share a common bond with the members of the core group. This relief, as a practical matter,

precludes credit unions from enrolling new members in these groups as existing members die or move away. The complaint also seeks the ultimate divestiture of those groups. This relief would destroy enormous investments made by credit unions to serve employer groups and undermine the viability of the federal credit union system.[10/]

Moreover, the D.C. Circuit's "suitable challenger" doctrine -- if not reviewed by this Court -- will continue to have far-reaching effects on agencies throughout the federal government. As this Court has noted when explaining its reasons for granting certiorari to review a decision of the D.C. Circuit on an important question of administrative law, "[s]ince the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 535 n.14 (1978). That has already happened with respect to the issue presented in this case. Since the D.C. Circuit formulated its "suitable challenger" test in 1989, it has applied that doctrine in numerous cases involving challenges to a wide range of

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10/ On October 25, 1996, the district court issued a permanent nationwide injunction granting the prospective relief sought by the plaintiffs. The claim for divestiture is still pending before the court.

agency actions.[11/] Given that court's dominant role in this area of the law, and the recurring impact of its new approach to standing, this Court should review that untested doctrine to determine whether it comports with the "zone of interests" analysis established by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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11/ *See, e.g., Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 900 (D.C. Cir. 1996); *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996); *Liquid Carbonic Industries Corp. v. FERC*, 29 F.3d 697, 705-06 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 724 (D.C. Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 907 (1992); *DKT Memorial Fund Ltd. v. Agency for International Development*, 887 F.2d 275, 286 (D.C. Cir. 1989).

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 29, 1995 Decided July 30, 1996

No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL.,
APPELLANTS

v.

NATIONAL CREDIT UNION ADMINISTRATION,
APPELLEE

AND

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 90cv02948)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Christopher R. Lipsett argued the cause for appellants, with whom *Michael S. Helfer, Leon B. Greenfield, John J. Gill, III,* and *Michael F. Crotty* were on the briefs.

Jacob M. Lewis, Attorney, U.S. Department of Justice, argued the cause for appellees, with whom *Frank W. Hunger,* Assistant Attorney General, *Eric H. Holder, Jr.,* United States Attorney, *Douglas N. Letter,* Litigation Counsel, U.S. Department of Justice, and *John K. Ianno,* Counsel, National Credit Union Administration, were on the brief for appellee National Credit Union Administration.

Paul J. Lambert and *Teresa Burke* were on the brief for appellees AT&T Family Federal Credit Union and Credit Union National Association.

Edward C. Winslow, III, and *William C. Scott* were on the brief for amicus curiae North Carolina Alliance of Community Financial Institutions.

Before: BUCKLEY, GINSBURG, and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: Section 109 of the Federal Credit Union Act (FCUA), 12 U.S.C. § 1759, provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The question presented in this appeal is whether the members of an occupational FCU must all share a single "common bond of occupation" or, as the National Credit Union Administration (NCUA) contends, membership may be drawn from multiple unrelated groups, each with its own common bond. The district court held that the NCUA reasonably interpreted that Act to allow members of unrelated groups to join the same credit union, provided only that a common bond exists among the members of each constituent group. 863 F. Supp. 9 (1994). Because the Congress resolved this very issue the other way, we reverse the district court and disapprove the decision of the NCUA under step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984).

I. Background

The plaintiffs-appellants are the American Bankers Association and several North Carolina banks, including First National Bank and Trust Company (FNBT). They brought this suit against the NCUA, the federal regulatory agency that administers the FCUA, seeking to overturn that agency's approval of certain applications filed by AT&T Family Federal Credit Union (ATTF) to expand its field of membership to include employees of various small businesses in North Carolina and Virginia that are unaffiliated with the credit union's existing membership base. ATTF and the Credit Union National Association, a trade association, have intervened in support of the agency.

Under the FCUA, an FCU is, like a mutual association or a cooperative, owned and controlled by its members, *see* 12 U.S.C. § 1757(6); it can make loans to and take deposits from (formally, sell shares to) only its own members and other credit unions, *see id.* § 1757(5). The Congress expected that the Act, by "guaranteeing democratic self-government[,] would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." *First Nat'l Bank and Trust Co. v. NCUA,* 988 F.2d 1272, 1274 (D.C. Cir. 1993).

The "common bond" provision has been part of the FCUA since the statute was enacted in 1934. The Congress did not fully explicate the purpose or limits of that provision, but "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default.... The common bond was seen as the cement that united credit union members in a cooperative venture." *Id.* at 1276.

From 1934 until 1982 the NCUA interpreted the common bond requirement to mean that the members of each occupational FCU—we put aside the associational alternative, which plays no role in this case—must be drawn from a single occupational group, defined to mean the employees of a single employer. 58 Fed. Reg. 40473 (July 28, 1993). In 1982,

however, the NCUA altered its interpretation of nearly 50-years' standing to allow an FCU to comprise not just one but "multiple occupational groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). Each such group need only be within a "well-defined area," IRPS 82-3, 47 Fed. Reg. 26808 (June 22, 1982), by which the NCUA means an area served by an actual or planned office (of which there may be any number) of the credit union, IRPS 89-1, 54 Fed. Reg. 31165, 31170 (July 27, 1989).

The 1982 change of interpretation was intended to enable each FCU to realize economies of scale and to facilitate occupational diversification within the ranks of its membership. *See* Letter from E.F. Callahan, Chairman of the NCUA, to Congressman Fernand J. St. Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs 8-9 (Oct. 28, 1983). The new policy also made it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU. 54 Fed. Reg. at 31171. The NCUA reiterated its new position through policy statements issued in 1989, when ATTF filed the first of the applications that FNBT here challenges, and most recently in 1994. *See id.* at 31165; IRPS 94-1, 59 Fed. Reg. 29066 (June 3, 1994). The agency explained in 1989 that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." 54 Fed. Reg. at 31176.

FNBT's complaint is at bottom that Interpretive Ruling 89-1 violates the FCUA by allowing groups lacking any common bond among them to join together in a credit union, ATTF in particular. Originally chartered in 1952 as the Radio Shops Federal Credit Union, the common bond of ATTF members was that they were "[e]mployees of the Radio Shops of Western Electric Company, Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate

families; and organizations of such persons." ATTF has since grown to have 112,000 members in more than 150 disparate occupational groups spread across all 50 states, including the employees of a major tobacco company, an auto supply chain, and a television station. Its potential membership exceeds 357,000. As of January 1994 ATTF had more than 63,000 loans outstanding, totaling over $268 million. FNBT maintains that by allowing ATTF to accept members from among the employees of any number of employers, the NCUA has in effect opened the membership to anyone with a job.

Initially, the district court dismissed this case for lack of standing, 772 F. Supp. 609, 612-13 (1991); on appeal, however, we reversed on the ground that the banks are "what we have termed suitable challengers, that is ... their interests are sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." 988 F.2d at 1275. We remanded for a determination on the merits, as to which the district court granted the defendant's motion for summary judgment. 863 F. Supp. 9. The district court held that the common bond requirement is ambiguous and that the NCUA's interpretation of the provision to mean that "a credit union may have several groups, each with its own common bond" is reasonable.

II. Analysis

We review an agency's interpretation of a statute entrusted to its administration under the familiar rubric of the *Chevron* case: If the Congress has "directly spoken to the precise question at issue," the court "must give effect to the unambiguously expressed intent of Congress"; if, however, the statute is silent or ambiguous on the question at issue, then the court will defer to the agency's interpretation if it is permissible in light of the structure and purpose of the statute. 467 U.S. at 842-43. In resolving the threshold question whether congressional intent is sufficiently clear for us to review the case under step one of *Chevron*, "we are not required to grant any

particular deference to the agency's parsing of statutory language or its interpretation of legislative history." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984).

FNBT argues this case under step one of *Chevron* only. According to FNBT, the intent of the Congress is clearly discernible from the statutory text and the purpose of the statute. We agree.

A. Section 109 by Its Terms

To repeat, § 109 provides in relevant part that "Federal credit union membership shall be limited to groups having a common bond of occupation ... or to groups within a well-defined neighborhood, community, or rural district." FNBT contends, first, that the article "a" in the phrase "groups having a common bond" means that all members of an FCU must be united by a single occupation. The NCUA counters that the plural noun "groups" in the same phrase indicates that there may be multiple groups in an FCU, so that the statute makes sense only if it is understood to contemplate multiple bonds, each uniting a single group even if the same bond does not unite all groups, *i.e.*, the membership as a whole.

Neither syntactical argument is convincing. The article "a" could as easily mean one bond for each group as one bond for all groups in an FCU, and the plural noun "groups" could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union under the FCUA. Indeed, focusing upon "groups" begs the question whether they must share a common bond; it is, after all, a common bond that makes a group of what would otherwise be a collection of individuals without a theme.

Nonetheless, use of the word "groups" in § 109 does support FNBT's interpretation and not the NCUA's. As a leading dictionary of the time put it, a group is an "assemblage ... having some resemblance or common characteristic." *Webster's New International Dictionary* 955 (1927). By this definition, a common bond is implicit in the term

"group." Therefore, if two or more "occupational groups" can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups.

Or, viewing the question another way, the term "common bond" would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU. Instead of limiting membership to "groups having a common bond of occupation," the Congress could, without affecting the meaning of the statute, have simply said "occupational groups." The addition of the term "common bond" is necessary only to impart the idea that the bond is one shared by all members of the FCU—regardless whether the FCU is composed of one or of multiple groups. If the members of a group are by definition bonded, then it is tautological to say that a single group has a common bond; but if multiple groups are said to have a common bond, then there is no tautology—the members of each group share the same bond as the members of the other groups.

For example, because the NCUA defines an occupational group to mean the employees of a single employer, 58 Fed. Reg. at 40473, it is redundant to require that the workers at Company A have a common bond; their employment by Company A is their common bond and that bond is what makes them an occupational group. Suppose, however, that the employees of unaffiliated Company B propose to join the FCU at Company A. The Act clearly forecloses this possibility for want of a common bond among the employees. Now suppose that Company A buys Company B, which remains a separate subsidiary. Joint ownership of Companies A and B creates a common bond extending across the two groups; the employees of Company B could then become members of the FCU at Company A.

We do not dismiss out of hand the possibility that the term "common bond"—although supererogatory when applied to the membership of a single group—nevertheless reflected ordinary usage in 1934. Moreover, having dissected enough statutes to know that they may upon occasion have redundant

terms, *see, e.g., American Fed'n of Gov't Employees, Local 3295 v. Federal Labor Relations Auth.*, 46 F.3d 73, 77 (D.C. Cir. 1995) ("no construction of § 1462a [of the Federal Deposit Insurance Act] can avoid rendering either subsection (1) or subsection (2) redundant"), we look further before deciding with confidence that § 109 is unambiguous on its face.

FNBT's second textual argument is that the term "groups" in the two parallel provisions of § 109—permitting credit unions composed either of (1) "groups having a common bond of occupation" among all the members or of (2) "groups within a well-defined neighborhood, community, or rural district"—must be interpreted in a consistent way. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2455 (1992). If the so-called community provision were construed in a manner consistent with the NCUA's revised interpretation of the occupational provision, then a single FCU could include residents of any number of "well-defined neighborhood[s], communit[ies], or rural district[s]" around the country. Yet this expansive construction has never been advocated by the NCUA; on the contrary, the NCUA regulation implementing the community provision expressly requires that all FCU members live, worship, or work in "a single, geographically well-defined area." 59 Fed. Reg. at 29077.

The NCUA answers this argument by noting that the two grammatically parallel provisions of § 109 do not, upon close inspection, use the same terms: "the limitation of geographic groups to those 'within' a defined area," we are told, "clearly supports the NCUA's conclusion that membership in a community credit union may not consist of groups from widely dispersed locales." So it does; no one disputes the correctness of the NCUA's restrictive interpretation of the community clause. But the NCUA's point is not at all responsive to FNBT's argument. The question is how "groups" can be given a different meaning in the two parallel phrases: "groups having a common bond of occupation" and "groups within a well-defined [area]." The statute does not allow multiple groups, each within a different neighborhood, to form a single community FCU. Nor therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer), to form an occupational FCU.

In sum, the FCUA requires by its terms that all members of a credit union share a single common bond. Our example of two companies under joint ownership meets that statutory requirement—and does so without including unrelated groups, which would drain the phrase "common bond" of all meaning. The NCUA may identify and approve other types of common bonds, subject only to the rule of reason embedded in *Chevron* step two. Indeed, the agency might define an occupational group differently—*e.g.*, all workers in the same trade—and perhaps pass muster under *Chevron*. Alternatively, the NCUA may allow multiple occupational groups to form an FCU under a common bond of "association," if one can be found. If the statute is to be read as it is written, however, the one thing that the agency may not do is permit unrelated groups to form a single FCU unless a common bond unites all of the members.

To test the hypothesis that the common bond provision means what it says, we consult briefly the purpose of the statute and its legislative history.

B. The Purpose of § 109

First let us dispatch the suggestion of the North Carolina Alliance of Community Financial Institutions, a trade association that filed an *amicus* brief in support of FNBT, that the Congress intended the common bond provision to foreclose unfair competition between credit unions, which are tax exempt, and banks, which are not. ("Without a meaningful common bond provision, credit unions are merely banks with a leg up on other banks.") According to the Alliance, a principal purpose of the common bond is to constrict the market that credit unions can serve, thereby limiting the threat that they pose to banks. We squarely rejected this argument on the first appeal of this case: "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because

Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." 988 F.2d at 1275. Only "as time passed—as credit unions flourished and competition among consumer lending institutions intensified—[did bankers begin] to see the common bond requirement as a desirable limitation on credit union expansion." *Id.* at 1276.

FNBT itself makes a more persuasive argument based upon the purpose of the common bond requirement. The Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other in order to "ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could 'loan on character.'" *Id.* There can be little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose.

The NCUA points out that under its regulations a new group is not permitted to join an existing FCU unless the members are within an area that can reasonably be served from an existing or proposed office of the credit union. *See* 54 Fed. Reg. at 31170. This administrative policy might initially seem to blunt FNBT's claim that under the NCUA's current interpretation of the common bond requirement an FCU could accept anyone as a member simply because he or she is employed. Upon closer inspection, however, the agency's point is a makeweight. For whatever restraining force the common bond requirement retained after NCUA changed its interpretation of the Act in 1982, it did not impede ATTF's dramatic expansion. Indeed, as recently as 1985, ATTF's field of membership consisted basically of the employees of five AT&T affiliates who worked in, or were supervised from, certain areas within North Carolina or Virginia.

In short, reading § 109 as the 73d Congress wrote it, *i.e.*, to require that a single common bond be shared among all members of an occupational credit union, furthers the overriding purpose of the FCUA—to "unite[ ] credit union members in a cooperative venture." *First Nat'l Bank and Trust*, 988 F.2d at 1276; the NCUA's reading, which permits multiple unrelated groups to form an occupational FCU, frustrates that purpose. If this conception of an FCU seems dated in the world of ATMs and nearly nationwide financial institutions of a scale surely unimaginable in 1934, *see* Douglas H. Ginsburg, *Interstate Banking*, 9 HOFSTRA L. REV. 1133 (1981), then the case for updating the FCUA must be addressed to the Congress.

C. The Legislative History of § 109

Finally, we look to the legislative history of the FCUA only to determine whether it so convincingly contradicts our interpretation of the text, reinforced by our understanding of the purpose of the statute, as to require that we rethink the matter. Under these circumstances, only a show stopper would do.

FNBT emphasizes the Report of the Senate Committee on Banking and Currency, which defines a credit union, in part, as "a cooperative society ... limited in each case to the members of *a specific group with a common bond* of occupation or association." S. REP. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis supplied). The NCUA and ATTF extract their version of the legislative history from the Report of the House Committee on Banking and Currency, which paraphrases § 109 as providing that "[m]embership in Federal credit unions is limited to *groups having common bonds* of occupation or association." H.R. REP. No. 2021, 73d Cong., 2d Sess. 3 (1934) (emphasis supplied); *cf.* MARY ANN GLENDON, A NATION UNDER LAWYERS 197 (1994) (quoting Karl Llewellyn: "Never paraphrase a statute"). Thus do the parties replay their jejune debate over the use of a singular article and a plural noun in the statute itself. Not surprisingly, therefore, the NCUA ultimately joins in the district court's conclusion that the legislative history of the common bond requirement is "murky" and provides only "a slender reed on which to place reliance." 863 F. Supp. at 12. Whatever the precise

exchange rate between the metaphors may be, a slender reed is not a show stopper.

The district court itself assigned some weight to "the fact that Congress has not objected to ... the [NCUA's] 1982 expansion" of the common bond requirement. 863 F. Supp. at 18. In a *Chevron* step two analysis, where the issue is whether the agency's interpretation of the statute is reasonable, congressional inaction might be minimally enlightening. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983). This is a *Chevron* step one analysis, however; the silence of a later Congress says nothing about the intent of the earlier Congress that spoke directly to the question here at issue.

III. Conclusion

Based upon the text and the purpose of the FCUA, we conclude under *Chevron* step one that all the members of an FCU must share a common bond. If there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only.

Accordingly, we reverse the judgment of the district court. The case is remanded to that court for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. 90-2948

FIRST NATIONAL BANK AND TRUST CO., et al.,
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION et al.,
Defendants.

Decided Sept. 15, 1994.

A. Douglas Melamed, Wilmer, Cutler & Pickering, Washington, DC, for plaintiffs.

Paul J. Lambert, Bingham, Dana & Gould, Washington, DC, for defendants-intervenors.

Kenneth L. Doroshow, U.S. Dept. of Justice, Washington, DC, for defendants.

MEMORANDUM OPINION

Opinion for the court filed by District Judge PRATT.

On September 9, 1994, this Court conducted a hearing to consider whether the National Credit Union Administration's

("NCUA") interpretation of the "common bond provision" in the Federal Credit Union Act ("FCUA") [1] conflicts with the clear intent of Congress or whether the Court must defer to the NCUA's interpretation. The issue has been well-briefed on both sides. Based on the arguments and authorities presented by the parties in their briefs and during the hearing, we defer to the NCUA's interpretation of the common bond provision. Plaintiffs' renewed motion for summary judgment is denied and defendants' summary judgment motions are granted.[2]

I. Background

In 1991, the Court determined that plaintiffs did not have standing to challenge the agency decision because they were not the intended beneficiaries of the FCUA and because Congress did not intend to protect competitive interests. 772 F.Supp. 609 (D.D.C.1991) (Harris, J.). The Court of Appeals reversed, 988 F.2d 1272 (D.C.Cir.1993), cert. denied, — U.S. —, 114 S.Ct. 288, 126 L.Ed.2d 238 (1993), and the matter now comes before the undersigned judge for consideration on the merits.

Plaintiffs, four North Carolina banks and the American Bankers Association, challenge the NCUA's approval of several applications by AT & T Family Federal Credit Union ("AT & T Family") to expand its membership to include the employees of unrelated employers in several areas of the

[1] 12 U.S.C. § 1751 *et seq.*, particularly § 1759.

[2] Defendants filed two separate summary judgment motions. The first was filed by the NCUA and the second by AT & T Family Federal Credit Union and Credit Union National Association.

United States. Plaintiffs, which are conventional banks and their trade association, contend that they are suffering from the competition caused by the expansion of AT & T Family. At the September 9th hearing, the Court concluded that it was impossible to consider the validity of the application approvals by the NCUA without examining its interpretation of the common bond provision. The remainder of this opinion will focus on the common bond provision and whether the NCUA's interpretation conflicts with Congress' intent.

Congress first authorized federal credit unions during the Great Depression. It will be recalled that in March 1933, President Roosevelt found it necessary to close all banks and that the woeful state of the nation's banking system during the early 1930s left large segments of the population without access to necessary credit. Congress reviewed the then existing system of state licensed credit unions and determined that federal credit unions would improve access to credit for people of "small means." S.Rep. No. 55, 73d Cong., 2d Sess. 1 (1934). The basic statute was passed at that time.

By definition, a federal credit union is owned by its members and can issue loans only to its members or to other credit unions. 12 U.S.C. § 1757. To insure sound loan policies in an era before deposit insurance,[3] Congress restricted membership to "groups having a common bond of occupation or association." *Id.* § 1759. The original purpose behind the common bond provision was twofold: to insure the financial stability of credit unions by providing a sense of cohesiveness among members and by enabling the members to establish a borrower's credit worthiness at minimum cost; and to promote

[3] Federal credit unions have only been covered by deposit insurance (called "share insurance") since 1970.

the growth of credit unions because it was faster and easier to form a credit union with members who already had a common bond.

Until 1982, the NCUA and its regulatory predecessors interpreted the common bond provision as requiring that the members of each credit union have a single common bond with each other, although beginning in the 1960s, the NCUA began expanding the criteria for determining common bond in response to changing economic conditions. For example, in 1968, the NCUA permitted a "once a member always a member" inclusion under common bond. General Accounting Office, Credit Unions: Reforms for Ensuring Future Soundness 217 (1991) (hereafter "GAO Report"). The NCUA has followed a broader interpretation of "common bond" since 1982 which allows multiple unrelated groups to join the same credit union if each group has a common bond among its members.

The expansion of AT & T Family is premised on this interpretation which plaintiffs now challenge.[4] Plaintiffs seek injunctive and declaratory relief vacating all AT & T Family membership approvals since November 14, 1989.[5] Relief is sought on the theory that the NCUA's approval of the membership expansions violates the Administrative Procedure Act ("APA").[6] 5 U.S.C. § 706.

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[4] AT & T Family serves the employees of 150 unrelated employers, and has assets of more than $267,800,000.

[5] The relevance of this date has not been made known to the Court.

[6] The APA allows the reviewing court to set aside agency action found to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law." § 706(2)(A).

II. Analysis

[1] There are no material questions of fact precluding summary judgment in this case. The Court's review of an agency's interpretation of a statute must follow "the well-trodden path carved out in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 [104 S.Ct. 2778, 81 L.Ed.2d 694] (1984)." *Northwest Airlines, Inc. v. U.S. Dept. of Transportation*, 15 F.3d 1112, 1118 (D.C.Cir.1994). The first prong of the Chevron formulation, often called "*Chevron I*, " asks whether the Court, armed with the traditional tools of statutory construction, ... can ascertain clear congressional intent on the *precise* issue before us.

Id. (*emphasis added*). If the statutory language is silent or ambiguous on this specific issue, the Court then proceeds to the second prong of the Chevron formulation, "Chevron II." *Doe v. Sullivan*, 938 F.2d 1370, 1381 (D.C.Cir.1991). Under *Chevron II*, the Court must determine whether the agency's interpretation of the statute is a reasonable one. We are required to defer to the agency's construction of the statute as long as it is reasonable or permissible. Id.

A. Chevron I: Congressional Intent

1. The Language of the Statute

[2][3] The Court looks first to the language of the statute itself in establishing whether Congress intended to limit credit union membership to individuals having a single common bond.[7] *Nichols v. Asbestos Workers Local 24 Pension Plan*, 835 F.2d 881, 892 n. 86 (D.C.Cir.1987) ("the best guide to what a statute means is what it says ") (emphasis in original). Plaintiffs argue that the common bond provision should be read in the singular, i.e., that each credit union shall have a single common bond. Defendants counter that the reference to "groups" proves that Congress contemplated multiple groups within a single credit union.

The Court concludes that either interpretation is plausible. The first portion of the statute appears to use "federal credit union membership" in the singular as it requires each member to "subscribe to at least one share of its [the credit union's] stock." It is plausible that the second reference to "Federal credit union membership", in the common bond phrase, is also meant in the singular, but then contemplates several "groups" within that one credit union. A "court must look to the particular statutory language at issue, as

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[7] The relevant portion of the statute at issue reads as follows: Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by [the NCUA], as may be elected to membership and as such shall each, subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to *groups* having a common bond of occupation or association....§ 1759 (*emphasis added*).

well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991). Therefore, a reasonable reading of the common bond provision is that a credit union may have several groups, each with its own common bond. [8]

Plaintiffs counter that such a reading of the statute would permit limitless growth by federal credit unions and frustrate the limitations evident in the statutory language. We disagree. "Whereas almost all private business will serve any customer, the 'customers' of each federal credit union ... are expressly 'limited to groups having a common bond.' " *United States v. Michigan*, 851 F.2d 803, 807 (6th Cir.1988). Each group must "be employed by the same enterprise" or belong to the same association that has "common loyalties" and holds yearly meetings.[9] 54 Fed.Reg. 31169.

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[8] The Court disagrees that other federal courts have held to the contrary. In all but one of the cases cited by plaintiffs, the common bond provision was not at issue in the case. *See e.g. Sister of the Presentation of the Blessed Virgin Mary v. NCUA*, 961 F.2d 733 (8th Cir.1992) (determining whether credit union member was an "equity holder" or a "creditor"). The one case that discussed the common bond provision in any detail, *Bd. of Dir. Forbes Federal Credit Union v. NCUA*, 477 F.2d 777 (10th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 233, 38 L.Ed.2d 158 (1973), was issued prior to the NCUA's 1982 interpretation. In addition, the case concerned an attempt by a credit union to reinterpret its single common bond, not an attempt to reinterpret the concept of a "common bond" by adding unrelated groups.

[9] There are other limits on the expansion of credit unions. *See e.g.*, 54 Fed.Reg. 31176 (enumerating various limitations); GAO Report at 219- 20.

[4] When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. *International Union, UMW v. Federal Mine Safety and Health Admin.*, 920 F.2d 960, 963 (D.C.Cir.1990) (statute is ambiguous if it does "not clearly preclud[e]" the agency's approach). Next we look to the legislative history for a possible resolution of this ambiguity.

2. Legislative History of the Common Bond Provision

The legislative history concerning the common bond provision is predictably murky and is a slender reed upon which to place reliance. "Congress did not ... elaborate on th[e] definition [of the common-bond provision] at the time [the FCUA was debated] or express the reason for the requirement." GAO Report at 217.[10] Both sides point to isolated portions of the record; particularly to the differing language in the Senate and House of Representatives committee reports of 60 years ago.

Plaintiffs rely on a statement from a 1934 Senate Report in which the Committee describes credit unions as, *inter alia*, "limited in each case to the members of a specific group with a common bond of occupation or association." S.Rep. No. 555, 73d Cong., 2d Sess. (1934). In context, however, this statement may well be little more than a description of the field of state credit unions as they existed in 1934. It appears to be a descriptive rather than

[10] *See also NCUA, Studies in Federal Credit Union Chartering Policy 12 (1979)* (hereafter "NCUA Report") ("There is very little in the legislative history that can be characterized as a[n] insightful, analytic discussion of the essence of the [common-bond] phrase, and of its intended scope and application"); *A. Burger & T. Dacin, Field of Membership: An Evolving Concept* (2d ed. 1992).

exhaustive statement and not meant to define the limits of credit union organization. NCUA Report at 14.[11]

[5] Defendants seize upon the House Report which indicates that "[m]embership in Federal credit unions is limited to groups having common bonds of occupation or association or to groups within well-defined communities." H.R.Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934). We are equally unwilling to overemphasize the importance of this statement. The legislative record, taken as a whole, does not provide the clear and certain indication that Congress intended to preclude the NCUA's current interpretation of the common bond provision. *Rust v. Sullivan*, 500 U.S. 173, 184, 111 S.Ct. 1759, 1768, 114 L.Ed.2d 233 (1991); *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1057 (D.C.Cir.1981).

[6] What remains evident is the overall congressional intent to promote the creation and growth of credit unions. *First Nat'l Bank & Trust*, 988 F.2d at 1275 ("Congress' general purpose was to encourage the proliferation of credit unions"). It is readily apparent that the common bond provision was not the defining characteristic of a credit union.[12] *Barany v. Buller*, 670 F.2d 726, 734 (7th Cir.1982) ("[t]he salient feature of credit unions is their democratic control and management"); S.Rep. No. 555, 73d Cong., 2d Sess. 8 (1934) ("the sole purpose in the bill is to protect credit unions from further losses from the

[11] It should be noted that although this report was prepared by defendant NCUA, it predates by three years the interpretive change at issue in this case.

[12] The common-bond concept does not appear anywhere in the statutory definition of a credit union. See 12 U.S.C. § 1752(1).

failure of banks which constituted the greatest source of loss to credit unions during the depression"). In determining the meaning of a specific provision, the Court must look to the provisions of the entire law, and to its object and policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed.2d 39 (1987).

[7] The common bond provision was not an end in itself, but its purpose was to support the underlying policy of promoting stable credit unions. It also suggests that Congress intended a flexible interpretation of the provision.[13] This assumption is supported by the fact that Congress has not objected to either the original agency interpretation or the 1982 expansion.[14] "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." *United States v. Riverside Bayview Homes,*

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[13] The Court rejects plaintiffs' contention that the NCUA policy is contrary to Congress' intent simply because the policy may represent a change from nearly 50 years of prior interpretation. Rust, 500 U.S. at 186, 111 S.Ct. at 1769 ("[t]his Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question") (citing *Chevron*, 467 U.S. at 862, 104 S.Ct. at 2791); see also *Nat'l Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 230-31 (D.C.Cir.1992) ("[a]n agency, in light of changed circumstances, is free to alter the interpretive and policy views reflected in regulations construing an underlying statute, so long as any changed construction ... is consistent with express congressional intent or embodies a 'permissible' reading of the statute").

[14] Congress was repeatedly made aware of the revised common bond interpretation by the NCUA, by lobbyists from the banking industry, and by the GAO. *See e.g. NCUA 1982 Annual Report to Congress*, 1; GAO Report at 218-19.

Inc., 474 U.S. 121, 137, 106 S.Ct. 455, 464, 88 L.Ed.2d 419 (1985).

The NCUA was given a mandate to "provide more flexible and innovative regulation" in the face of changing economic conditions. S.Rep. No. 91-518, 91st Cong., 2d Sess. (1970), U.S.Code Cong. & Admin.News 1970, p. 2479, 2481. Such economic changes require only brief discussion. For example, until 1970, share accounts in federal credit unions were not insured. Until that time, a restrictive definition of "common bond" served the goal of individualized loan decisions by members who knew one another. See GAO Report at 231. Now that share accounts are insured, the NCUA, and it appears Congress as well, has determined that larger credit unions can better spread the risk of loan defaults. *See e.g. id.* at 219 (FCUA amended in October 1992 to allow the NCUA to merge or transfer assets of credit unions in danger of insolvency).

In sum, the congressional record does not provide a clear indication that Congress intended to limit each credit union to a single group sharing a common bond. In the face of such ambiguity we cannot conclude that Congress precluded the NCUA's interpretation of the common bond provision. Therefore, it is necessary to determine whether this interpretation is reasonable.

B. Chevron II: Reasonableness of the NCUA's Interpretation

[8] It is well established that, in case of ambiguity, we must defer to the agency's interpretation if it is a reasonable one. Plaintiffs have not seriously argued that the interpretation under challenge is unreasonable. Indeed, it

would be a daunting task for them to do so. The NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions. For example, NCUA policy requires that groups seeking to form credit unions have at least 500 members. Many of the recent additions to AT & T Family are companies employing far fewer than 500 people. Employees in small companies have gained the access to credit unions that they would be denied under plaintiffs' interpretation.

III. Conclusion

The Court concludes that the NCUA's interpretation of the common-bond provision is a reasonable construction of an ambiguous statute. We acknowledge that it is debatable whether credit unions the size of AT & T Family continue to need the special protection afforded by the FCUA. However, this is a policy matter best left to Congress. Until Congress addresses this matter, the Court will defer to the agency's interpretation of the statute at issue. Plaintiffs' renewed motion for summary judgment is denied and defendants' motions for summary judgment are granted.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-5262, 91-5336

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.

FIRST NATIONAL BANK AND TRUST COMPANY, et al.,
Lexington State Bank,
Appellants,

v.

NATIONAL CREDIT UNION ADMINISTRATION

Argued Nov. 16, 1992

Decided April 2, 1993

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Michael S. Helfer, with whom William J. Kolasky, Jr., John J. Gill, and Michael F. Crotty, were on the brief, for appellants.

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Edward C. Winslow and William C. Scott were on the brief, for amicus curiae North Carolina Alliance of Community Financial Institutions.

Before: WALD, SILBERMAN, and D.H. GINSBURG, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

Concurring opinion filed by Circuit Judge WALD.

SILBERMAN, Circuit Judge:

Appellants, four North Carolina banks and the American Banking Association, challenged the National Credit Union Administration's (NCUA) approval of several recent applications by AT & T Family Federal Credit Union (AT & T Family) to expand its membership. According to appellants, the NCUA's decisions violated the requirement of the Federal Credit Union Act (FCUA) that membership in federal credit unions be limited to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. The banks complain that, by allowing AT & T Family improperly to extend its membership and thereby its number of potential borrowing customers, the NCUA has made the credit union a formidable competitor. The district court applied the "zone of interests" tests for prudential standing and determined that appellants lacked standing to sue. Although we agree with the district court that the appellants were not intended beneficiaries of the FCUA, we think that they are suitable challengers because the statute arguably prohibits the competition of which they complain. This case thus falls within the rationale of *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). We reverse and remand to the district court.

I.

Passed in 1934 in the midst of the Great Depression, the FCUA, 12 U.S.C. §§ 1751-1795k (1988), was designed

to improve access to credit for people of "small means." S.REP. No. 555, 73d Cong., 2d Sess. 1 (934). For many working Americans, credit at reasonable rates had essentially disappeared in the years following the stock market crash. Lacking the security necessary to obtain loans from banks, working Americans turned to loan sharks who typically charged usurious interest rates, which was thought to reduce the overall purchasing power of American consumers. *See* 78 CONG.REC. 12,223 (1934). Congress saw the solution to this problem in a system of federal credit unions that would provide credit at reasonable rates and thus would help spur economic recovery. *See id.* at 7260, 12,223-25.

To ensure that credit unions fulfilled their purpose of meeting members' credit needs, Congress restricted credit unions' management and business activities. For example, a federal credit union is owned and controlled by its members, *see* 12 U.S.C. §§ 1757-1761, and it can make loans only to members or to other credit unions, *see id.* § 1757(5). Congress expected that such measures guaranteeing democratic self-government would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs.

A related provision of the FCUA, the common bond requirement, is at the heart of this case. Section 109 of the Act restricts membership in federal credit unions to "groups having a common bond of occupation or association." 12 U.S.C. § 1759. For much of the Act's history, the NCUA interpreted this provision to require all members of a credit union to share the same bond. In the 1980s, however, the NCUA issued a series of Interpretive Ruling and Policy Statements (IRPS) construing the statute to allow a number of different groups, each having its own bond, to form a credit union, even though no overall common bond united the different groups. *See* 47 Fed.Reg. 26,808 (1982) (IRPS 82-8); 48 Fed.Reg. 22,899 (1983); 49 Fed.Reg. 46,536 (1984) (IRPS 84-1); 54 Fed.Reg. 31,165

(1989) (IRPS 89-1). The NCUA's most recent interpretation, IRPS 89-1, made clear that a credit union could comprise a "combination of distinct, definable occupational and/or associational groups." 54 Fed.Reg. 31,165, 31,170 (1989).

Appellants challenged several decisions in which the NCUA applied IRPS 89-1 to approve applications by AT & T Family to expand its field of membership. Until recently, AT & T Family's membership consisted primarily of employees of AT & T Technologies, Inc., AT & T Network Systems, and Bell Telephone Labs. In late 1989 and 1990, AT & T Family filed eight applications to extend its membership to include groups of employees from other companies such as the American Tobacco Company, Western Auto Supply Company, and WGHP-TV, to name but a few. In all, the NCUA approved the extension of AT & T Family's membership to 16 new employee groups. Appellants claimed before the agency and in the district court that IRPS 89-1, ignored the statutory language by allowing groups lacking any common bond between them to join together in a credit union. The banks contended that by allowing AT & T Family to expand to 71,000 members in violation of the statute, the NCUA has allowed the credit union, which is exempt from state and federal income taxes, *see* 12 U.S.C. § 1768, to become a formidable competitor to banks.

The district court granted NCUA's motion to dismiss for lack of standing. The court determined that appellants were not pressing claims "arguably within the zone of interests' protected by the FCUA. *See First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 772 F.Supp. 609, 611-13 (D.D.C. 1991). Relying on the language of this court's post-*Clarke* decisions on prudential standing,f *see, e.g., Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C.Cir. 1989) (*HWTC IV*); *Hazardous Waste Treatment Council v. United States Envtl. Protection Agency*, 861 F.2d 277 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*), the

district court said that "[t]hose not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless 'suitable challengers' to the statute, because their interests coincide with the interests which Congress did intend to protect." *First Nat'l Bank*, 772 F.Supp. at 611. The banks were not intended beneficiaries of the Act, thought the district court, because "the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks." *Id.* at 612; *see also Branch Bank & Trust Co. v. National Credit Union Admin. Bd.*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987). Under applicable precedent, the district court believed that the banks were not suitable challengers either. Because the banks and the credit union competed for the same business, any coincidence in their interests "would be at best fortuitous." *First Nat'l Bank*, 772 F.Supp. at 612. The banks, according to the district court, could not rely on the Supreme Court's cases, *see, e.g., Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971) (*ICI*); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970), that granted standing to competitors as suitable challengers because, unlike the competitors in those cases, the banks were not suing under an entry-restricting statute. *See First Nat'l Bank*, 772 F.Supp. at 613.

II.

It should be noted that no one questions appellants' Article III standing; that appellants will suffer competitive or economic injury is not in doubt. The question before us is whether under the FCUA the banks can claim prudential standing as well. In other words, are they pursuing an interest (not just an objective), *see HWTC IV*, 885 F.2d at

925,[1] arguably within the zone of interests Congress intended either to regulate or protect, and, thus, are they among the class of persons entitled to sue to enforce FCUA's restrictions? *See Clarke*, 479 U.S. at 396, 107 S.Ct. at 755; *Data Processing*, 397 U.S. at 153, 90 S.Ct. at 829. This "zone of interests" test ensures that standing is granted only to plaintiffs who will not distort congressional objectives. It excludes those plaintiffs whose "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399, 107 S.Ct. at 757. Because the banks are not regulated by the common bond requirement, we must inquire whether the banks can be thought to have been "protected" by that statutory limitation on the activities of credit unions. Litigants can qualify as "protected" by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers, *see HWTC IV*, 885 F.2d at 923-24; that is, if their interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not "more likely to frustrate than to further the statutory objectives." *Clarke*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12.

Appellants claim that they qualify both as intended beneficiaries and as suitable challengers under the FCUA. We agree with the district court, however, that Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdain. *See* 78 CONG.REC. 7259 (1934) (statement of Sen. Barkley) ("[B]ank[s] . . . cannot extend credit to many of

[1] In *HWTC IV*, we emphasized that "It is the interests that the challenger seeks to protect and not the challenge with which we must be concerned." *HWTC IV*, 885 F.2d at 925.

these people, because they do not have the required security."); *id.* at 12,225 (statement of Rep. Luce) (noting that credit unions would serve those "who do not use and cannot use banks . . . for small borrowings"). The common bond requirement, an existing characteristic of state credit unions, was designed, in combination with the restriction that permitted credit unions to loan only to members, to ensure that credit unions would effectively meet members' borrowing needs. It would seem, therefore, that Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. That is surely why it was thought that credit unions, unlike banks, could "loan on character." *See id.* at 12,223. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.[2]

To be sure, as time passed—as credit unions flourished and competition among consumer lending institutions intensified—bankers began to see the common bond requirement as a desirable limitation on credit union expansion. To that end, in the 1970s bankers, according to appellants, became active in lobbying Congress to urge the maintenance of the common bond requirement. But that fact, assuming it is true, hardly serves to illuminate the intent of the Congress that first enacted the common bond requirement in 1934. And we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks.

There remains, however, the more subtle question, whether banks can be thought suitable challengers to en-

[2] The Senate report on the bill praised credit unions for their record of successful service during the Depression, a record that contrasted sharply with a grim history of bank failures, and attributed the success largely to credit unions' self-government and attentiveness to members' needs. *See* SEN.REP. No. 555, 73d Cong., 2d Sess. 2-4 (1934).

force a requirement designed to benefit the members—particularly potential borrowers—of credit unions. Appellants rely on the Supreme Court's reasoning in *ICI* and *Clarke*, and it seems to us the parallels between those cases and the present one are striking. In *ICI* the securities industry challenged a ruling by the Comptroller of the Currency that would have permitted banks to slip the Glass-Steagall leash and enter what was considered a part of the securities business. *See ICI*, 401 U.S. at 618-19, 91 S.Ct. at 1092-93. As the Supreme Court later explained in *Clarke*, the Glass-Steagall Act, which limited the securities underwriting and investment activities of banks, was designed to protect bank depositors from risky bank activities—not to insulate investment bankers, or indeed, any noncommercial bankers, from competition. *See Clarke*, 479 U.S. at 398 & n. 13, 107 S.Ct. at 756 & n. 13. Nevertheless, because the investment bankers pursued interests congruent with those of the intended beneficiaries, they were permitted to sue in *ICI* to enforce Glass-Steagall's restrictions on banks.

Similarly, in *Clarke* the ever-vigilant securities industry was permitted to challenge a Comptroller decision that authorized a national bank to offer discount brokerage services not only at its established branches, but also at locations both inside and outside the bank's home state. The challenge was based on the McFadden Act, which restricts the interstate branching of national banks. *See Clarke*, 479 U.S. at 391, 107 S.Ct. at 752. The Act was designed to establish competitive equality between national and state banks and thus to protect smaller banks from competition from out-of-state leviathans, *see First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261, 87 S.Ct. 492, 497, 17 L.Ed.2d 343 (1966), not to protect investment bankers. Nevertheless, the investment bankers had standing to sue. The Supreme Court relied on the correlative congressional objective of preventing national banks from gaining too much ("monopoly") control over credit and money through

"unlimited branching." *Clarke*, 479 U.S. at 402, 107 S.Ct. at 758. Given that general congressional purpose, the Court thought that the securities industry, which was a competitor at least with respect to discount brokerage services, was a suitable challenger. In other words, even though the Congress that passed the McFadden Act was not at all concerned with the spread of discount brokerage—only branch-banking—and the securities industry was a competitor with regard to the former, not the latter, it was nevertheless permitted to challenge the spread of discount brokerage through the McFadden Act, again because of the congruence of plaintiffs' interests with those of the intended beneficiaries.

We take from these cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.[3] The limitations may be restrictions on entry—geographic or product line—or they might be, as in our case, limitations on growth, which are akin to entry restrictions. Like more classic entry restrictions, the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market.

We previously have recognized the particular significance of statutory entry restrictions on prudential stand-

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[3] We cannot agree with the pre-*Clarke* reasoning of *Branch Bank & Trust Co. v. National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), in which the Fourth Circuit focused exclusively on the question whether banks' interests were intended to be protected under the FCUA and concluded that banks do not have standing under the FCUA, *see id.* at 626. The subsequent explication of the suitable challenger route to standing in *Clarke* empties the *Branch Bank* decision of its persuasiveness.

ing. In *HWTC II*, we distinguished the case before us from the Supreme Court's cases granting standing to competitors (*Data Processing*, *ICI*, and *Clarke*), on the grounds that it did not involve an "entry-restricting" statute. *See HWTC II*, 861 F.2d at 284. Similarly, in *Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Administration*, 822 F.2d 1105 (D.C.Cir. 1987), we noted that "[c]ompetitors have a seemingly unbroken record of success in securing standing" in cases involving regulatory systems that "restrict[] entry into a particular field or transaction." *Id.* at 1109. Indeed, the district court attempted to distinguish this case from *ICI* and *Clarke* on the grounds that the common bond requirement was not an entry restriction.[4] *See First Nat'l Bank*, 772 F.Supp. at 613.

Appellees, sidestepping the entry-restriction cases, rely primarily on our refinement of prudential standing analysis in *HWTC IV*. In that case, an organization of companies that treated hazardous waste and marketed products derived from processed waste sued to force the EPA to adopt stricter environmental regulations on other companies so as to create a greater market for their own services and products. We held that HWTC's interests (irrespective of its particular objectives in the case before us) were not sufficiently congruent with those of the intended beneficiaries of the statute to make HWTC a suitable challenger. *See HWTC IV*, 885 F.2d at 924. The treatment firms' interest was in selling more services and equipment to the regulated companies, and therefore the firms would seek regulations that would increase demand for their product regardless of the effects on the statute's intended bene-

[4] We have expressed concern in the past about allowing potential plaintiffs to gain standing through a facile assertion that they are enforcing entry-restricting legislation (a concern that again highlights the importance we have implicitly attached to entry restrictions in standing cases). *See HWTC II*, 861 F.2d at 284. This, of course, is not such a case.

ficiaries. We concluded that to have standing under the statute, HWTC would have to have shown a systematic alignment of interests with the statute's beneficiaries, *see id.* at 924, a standard that appellees understandably claim was stricter than our prior characterization of *Clarke* as a test requiring "less than a showing of congressional intent to benefit but more than a marginal relationship to the statutory purposes." *HWTC II*, 861 F.2d at 283.

Our decision did not rest on a conclusion that the economic interests of the treatment first were somehow less deserving than the environmental interests the statute was designed to foster; nor was it based on a view that the firms' economic incentives were inherently less worthy than the economic objectives of the securities industry plaintiffs in *ICI* and *Clarke*. On the contrary, the economic motivations could be thought analogous. If the watchword of the treatment firms in *HWTC IV* was "treatment is good and more treatment is better," *HWTC IV*, 885 F.2d at 925, it might be said that the watchword of all competitors with regard to their potential rivals must be "regulation is good and more restrictive regulation is better." And one cannot base standing on one's mere status as an economic beneficiary of government regulation of others. In *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Supreme Court said:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883, 110 S.Ct. at 3186.

The distinction between *HWTC IV* and the Supreme Court's *Lujan* hypothetical on the one hand and *ICI* and *Clarke* on the other must be that in *ICI* and *Clarke* the potentially limitless incentives of competitors were channelled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation dividing the banking and securities industries. The interests the securities industry plaintiffs sought to protect were thus less open-ended and more confined than were the economic interests pursued in *HWTC IV*, and as a result there was a reduced danger of distorting congressional purpose. By contrast, nothing in the statute in *HWTC IV* could ensure that there would be any connection at all between the treatment firms' interests and the statutory purpose. "[T]here is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for their particular treatment services will serve [the statute's] purpose of protecting health and the environment." *HWTC IV*, 885 F.2d at 924. There is, however, a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end. The restriction connects the economic interests of competitors to the purposes of the statute and yet constrains competitors to a limited role in guarding a congressionally drawn boundary. In these circumstances the plaintiffs can be thought to have interests "systematically aligned" with those the statute is designed to benefit.

The securities industry plaintiffs in *ICI* and *Clarke* were not seeking to impose new regulations on banks in areas unrelated to an existing, specific statutory norm simply to provide a demand for their services or to weaken banks as competitors.[5] We certainly would not accept as a suit-

[5] Perhaps it is also relevant—in considering whether a plaintiff has

able plaintiff a party who had only a general economic interest in harming a competitor and who, accordingly, sought to impose some new, more onerous regulation upon that competitor. *See, e.g., Calumet Indus., Inc. v. Brock*, 807 F.2d 225, 228 (D.C.Cir. 1986). But, when the plaintiff seeks to enforce a statutory restriction on his competitor—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of a statutory scheme.

Our reasoning in *HWTC* suggests that our reaction might be different if the banks appeared before us, not asking to patrol the common bond picket line, but seeking a new regulation that would squeeze the credit unions into a smaller market or even eliminate them from the market altogether. It is unnecessary, however, to extend our holding into a definitive answer to appellants' hypotheticals; we concede that the general issue is devilishly complex. We feel confident, however, that this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC*, and, therefore, we hold that appellants have standing. The judgment of the district court is reversed and the case remanded.

WALD, Circuit Judge, concurring:

The panel opinion's analysis of precedents on "entry-restricting" statutes quite correctly concludes that, under circuit case law, as well as under the Supreme Court's directives in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987), and *Investment Company Institute v. Camp*, 401 U.S. 617, 91

prudential standing, if not Article III standing, *see Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227, 94 S.Ct. 2925, 2935, 41 L.Ed.2d 706 (1974)—to ask whether, as the Supreme Court may well have in *ICI*, one can be confident that the intended beneficiaries had sufficient incentive and organizational resources to sue. *See HWTC II*, 861 F.2d at 284.

S.Ct. 1091, 28 L.Ed.2d 367 (1971), plaintiff banks have standing to challenge the NCUA's interpretation of the common-bond requirement. I agree with my colleagues that, where an entry-restricting or analogous statute is involved, "a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may do so to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Panel opinion ("Panel op.") at 9.

I originally—and still—disagree, however, with the "suitable challenger" test articulated in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (1989) (*HWTC IV*), which requires a "systematic coincidence," *id.* at 924, or "systematic alignment," Panel op. at 10, 12, of interests between the would-be plaintiffs and the statute's intended beneficiaries. As I stated at the time, I find this test without roots either in Supreme Court law[1] or in the general purposes of standing. *See HWTC IV*, 885 F.2d at 927-34 (Wald, C.J., dissenting). I recognize, however, that this test is nonetheless part of our circuit law. In that context, I agree with the panel opinion that, when an entry-restricting or analogous statute "reflects a congressional judgment that the restraint on competition is the means to assure the statutory end," Panel op. at 11, and plaintiffs seek only to "enforce the statutory demarcation," *id.*, between the beneficiaries of a licensing scheme and their competitors, plaintiffs clearly satisfy the goal of the "suitable challenger" test, *i.e.*, to ensure that plaintiffs are

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[1] It should be noted that, while the Supreme Court in *Clarke v. Securities Industry Association*, 479 U.S. 388, 107 F.Ct. 750, 93 L.Ed.2d 757 (1988), did determine that the securities industry was a "proper party" to challenge the Comptroller's decision to permit expanded bank activities, *id.* at 403, 107 S.Ct. at 759, it did so under its own "not . . . especially demanding" zone of interest test, *id.* at 399, 107 S.Ct. at 757, not under any "suitable challenger" test akin to that laid down in *HWTC IV*.

more likely to further than to frustrate the purpose of the statute. *See HWTC IV*, 885 F.2d at 925; *see also Clarke v. Securities Industry Ass'n*, 479 U.S. at 397 n. 12, 107 S.Ct. at 756 n. 12 (citing this as purpose of "zone of interest" test).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 90-2948 SSH

FIRST NATIONAL BANK AND TRUST COMPANY, Piedmont State Bank, Lexington State Bank, Randolph Bank and Trust Company, Bankers Trust of North Carolina, and American Bankers Association,
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION,
Defendant,

and

AT & T Family Federal Credit Union and Credit Union National Association, Inc.,
Defendants-Intervenors.

Aug. 9, 1991

Michael S. Helfer, William J. Kolasky, Jr., Lance W. Edwards, John J. Gill and Michael F. Crotty, Washington, D.C., for plaintiffs.

Vaughn Finn and Theodore C. Hirt, Washington, D.C., for defendant.

Paul Joseph Lambert, Washington, D.C., for defendants-intervenors.

OPINION

STANLEY S. HARRIS, District Judge.

Plaintiffs, five North Carolina banks and the American Bankers Association, challenge decisions by the National Credit Union Administration (NCUA) approving amendments to the charter of the AT & T Family Federal Credit Union (AT & T Family) expanding its field of membership. They allege that when the NCUA approved the amendments, it acted arbitrarily and capriciously, and violated the statutory requirement under the Federal Credit Union Act, 12 U.S.C. § 1751 *et seq.* (FCUA), that there be a "common bond of occupation or association" among the members of a federal credit union association. Pursuant to 5 U.S.C. § 706 and 28 U.S.C. §§ 2201 and 2202, they ask that various NCUA approvals of applications by AT & T Family be declared null and void and that defendant be enjoined from approving similar amendments to AT & T Family's charter. Now before the court are defendant's motion to dismiss for lack of standing and plaintiffs' opposition thereto. For the reasons set forth below, defendant's motion is granted, and the case is dismissed.

BACKGROUND

The Federal Credit Union Act was passed in 1934, in the wake of the Great Depression. After the crash, access to credit had been virtually eliminated for the great majority of the working class: most potential borrowers lacked the security to acquire a loan from a bank, and other licensed money lenders were able to charge extremely high interest rates. S.Rep. No. 555, 73d Cong., 2d Sess. 3 (1934); *see also* 78 Cong.Rec. 7259 (1934). Without access to credit, the nation's lower and middle classes saw their buying power spiral downward. S.Rep. No. 555 at 3.

The establishment of national credit unions, modelled after state supported organizations which had thrived through the economic chaos of the Depression, was seen as a "happy medium" between the loan shark and the bank. 78 Cong.Rec. 7259 (1934). Congress expected that members of credit unions, "with their own money and

under their own management," would be able to solve their own credit difficulties. S.Rep. No. 555 at 2. It was hoped that with access to small amounts of funds at reasonable interest rates, national credit unions would return significant buying power to those otherwise unable to have it. *Id.* at 1. Though state-sponsored credit unions fulfilled this need in some areas, Congress felt that the nation would benefit from a federal system because it would be capable of rapid expansion and would permit the creation of credit unions in states that did not previously authorize them. *Id.* at 2, 3.

The credit union is distinctive in that it is the members who own and control the organization. Members purchase shares in the credit union and exercise control over it democratically, irrespective of the number of shares held. 12 U.S.C. §§ 1757(6), 1760 (1988). Loans may be made only to members of the organization or to other credit unions. § 1757(5). Each credit union is managed by a board of directors elected annually by and from the members, and no member of the board receives any compensation for these services. § 1761. Supervision and chartering of credit unions is entrusted to the Board of the National Credit Union Administration (NCUA), a three-member panel appointed by the President upon the advice and consent of the Senate. §§ 1752a, 1754, 1756.

At issue in this case is § 109 of the FCUA, now codified at 12 U.S.C. § 1759, which provides that members of a credit union must share "a common bond" of occupation, association, or location. The NCUA has defined a common bond as:

> the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public. This unifying factor must be something more than an unfocused, generalized agreement on a given topic, or

> a common belief or philosophy on matters of general concern.

45 Fed.Reg. 8285 (1980).

In recent years the NCUA has interpreted the common bond requirement to allow a number of occupational or associational groups to form a credit union if each group shares its own common bond. *See* 12 C.F.R. § 701.1 (1991); 54 Fed.Reg. 31,169 (1989). Plaintiffs challenge decisions by the NCUA approving applications by AT & T Family to expand its membership to include employee groups that have a separate common bond from the AT & T employee group. Defendant moves to dismiss for lack of standing to sue under its FCUA, and is joined in that motion by intervenors AT & T Family and Credit Union National Association, Inc.

DISCUSSION

The Administrative Procedure Act (APA) grants standing to anyone "adversely affected by agency action within the meaning of the relevant statute."[1] 5 U.S.C. § 702. In *Association of Data Processing Service Organizations v. Camp,* the Supreme Court explained that a party meets this standard if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in ques-

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[1] In order to bring their claim, plaintiffs must show that they have both constitutional and prudential standing. *See National Federation of Federal Employees v. Cheney,* 883 F.2d 1038, 1041 (D.C.Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990). To establish constitutional standing, a plaintiff must allege an injury-in-fact which is fairly traceable to the conduct complained of and likely to be redressed by the relief requested. *See Allen v. Wright,* 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Because the court dismisses the amended complaint for lack of prudential standing, it need not address the issue of Article III standing.

tion." 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Since *Data Processing*, the "zone of interests" test has been the standard by which the Court has judged questions of standing under § 702 of the APA.

The Court clarified what it means for a complainant to be within the "zone of interests" of a statute in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The ultimate inquiry, it asserted, is centered upon congressional intent. *Id.* at 399, 107 S.Ct. at 757. In view of Congress's evident intent to make agency action presumptively reviewable, a plaintiff has standing only if Congress intended for that particular class of plaintiffs to be relied upon to challenge agency action allegedly in disregard of the law. *Id.* The goal of the test is to exclude those plaintiffs who are more likely to frustrate than to further statutory objectives. *Id.* at 397, n. 12, 107 S.Ct. at 756, n. 12. In cases where a party is the subject of the contested regulation, it is clear that Congress intends for that party to be able to act as a "private attorney general" through bringing a suit to enforce the statute. *Id.* at 399, 107 S.Ct. at 757. But when not the subject of the statute, a party will be denied review if its interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." *Id.* at 399-400, 107 S.Ct. at 757.

Though the test is not meant to be especially demanding and there need be no explicit indication of congressional purpose to permit the suit, there are occasions where the requisite congressional intent is not present. *Id.* The Curt provided a hypothetical example of such a case in *Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company

> that has the contract to record and transcribe the agency's proceedings' but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Such a company certainly would have Article III standing because it would have suffered an injury-in-fact which is fairly traceable to the agency action, but it would not meet the heightened requirement of prudential standing as defined by the APA. It simply is not the type of challenge which Congress would have imagined when it passed the statute. *See also Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, ___ U.S. ___, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (union representing Postal employees does not have standing to challenge the Postal Service's suspension of a statute designed to preserve adequate revenues for the Service.).

The D.C. Circuit has had occasion to clarify this standard further. Those not regulated by an agency have standing only if they are the intended beneficiaries of the specific statute or are nonetheless "suitable challengers" to the statute because their interests coincide with the interests which Congress did intend to protect. *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 924 (D.C.Cir. 1989) (*HWTC IV*). A party is a suitable challenger if its interests coincide systematically, and not simply fortuitously, with the interests of those whom Congress intended to protect. *Id.; Hazardous Waste Treatment Council v. United States Environmental Protection Agency*, 861 F.2d 277, 283 (D.C.Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3157, 104 L.Ed.2d 1020 (1989) (*HWTC II*).

The legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interest of banks. As noted,

credit unions were seen as a "happy medium" between the loan shark and the bank at a time when neither could satisfy the normal credit needs of the working class. 78 Cong.Rec. 7259 (1934). Further, Congress concluded that commercial banks were not in a position to make funds available to those of small means who generally had no security for loans. *Id.* Against this backdrop, it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks.

Nor was the common bond requirement included in the Act to protect banks. Instead, it was designed to ensure that credit unions remain responsive to those they were designed to serve. A major selling point for the FCUA was the outstanding record of state credit unions through the Depression, a record which was attributed to their democratic control, honest management, and faithful service to members. Sen.Rep. No. 555 at 2. It was largely through its limitation of membership to those with a common bond that credit unions were thought to fulfill this democratic ideal. *Barany v. Butler,* 670 F.2d 726, 734 (7th Cir. 1982); *La Caisse Populaire Ste. Marie v. United States,* 563 F.2d 505, 509 (1st Cir. 1977). Such an arrangement was supposed to make credit unions "incapable of exploitation." Sen.Rep. No. 555 at 3. For their part, plaintiffs can cite nothing in the legislative history of the FCUA to buttress their assertion that the common bond requirement was designed to protect banks.[2]

---

[2] Plaintiffs point only to a statement made during a hearing regarding a credit union authorization for the District of Columbia two years before the FCUA to support their argument. *See* Plaintiff's Motion of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 12. The speaker mentioned in passing that amendments to the D.C. bill had been proposed after considering the suggestions of the Bankers' Association of the District of Columbia. Even if this court were to accept the legislative history of the D.C. statute as evidence of congressional intent with regard to the federal statute, it is hardly convincing evidence that Congress was trying to protect the interests of commercial banks when it enacted the common bond requirement. In fact, the passage cited emphasizes that the primary concern in authorizing credit unions was that they be successful.

Having shown that Congress did not have in mind the competitive interests of banks when it enacted the common bond requirement, it is a short step to conclude that neither are banks suitable challengers to actions taken under the authority of the FCUA. As this case shows, the interests of banks will rarely if ever coincide with those of credit unions, the interest which Congress did intend to protect, because both compete for the same business. Any coincidence of interest would be at least fortuitous. Thus, because they are neither intended beneficiaries nor suitable challengers, commercial banks are not within the zone of interests which Congress intended to protect when it passed the FCUA.

This position is in keeping the D.C. Circuit decisions on the subject of prudential standing In *HWTC IV* and *HWTC II,* the court found no standing for waste treatment companies which suffered competitive injury and challenged the regulatory structure for the safe treatment, storage, and disposal of hazardous wastes. Because those regulations were designed to protect human health and the environment and not to improve the business opportunities of waste treatment companies, the court was unwilling to infer that Congress intended for such companies to be able to challenge the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. Nor did their interests coincide with the interests Congress intended to protect to the point at which they could nonetheless be seen as "suitable challengers" to the regulations. *HWTC IV,* 885 F.2d at 924; *HWTC II,* 861 F.2d at 283. In either case, the fact that firms are benefitted by congressional action, like the court reporters in *Lujan v. National Wildlife Federation* and like the commercial banks in this case, does not mean that an agency decision with regard to that decision con-

fers standing. *Id.; see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C.Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3214, 110 L.Ed.2d 662 (1990) (organization of federal employees lacks standing to contest the Army's decision to contract out certain services as violative of statutes designed to coordinate budgeting procedures and increase efficiency in government operations.).

The Fourth Circuit reached the same conclusion when presented with facts virtually identical to these. In *Branch Bank & Trust C. v. National Credit Union Administration*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987), the court found no standing for banks to challenge application of the common bond requirement:

> [T]he general purposes of the Act, rather than indicating a desire to protect banks, instead suggest that competitive interests of banks were purposely sacrificed by Congress to the interests of facilitating credit for people of limited personal means. . . . [T]he common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.

Id. at 626.

Given this specific rationale for the common bond requirement, the court was unwilling to attribute to it a meaning at odds with the general goals of the statute. *Id.* This court shares the Fourth Circuit's basic conclusion.

Plaintiffs erroneously rely on a string of cases in which the Supreme Court has found standing where a group or business has suffered a competitive injury due to agency action. *See Clarke*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987); *Data Processing*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970); *Investment*

Co. Institute v. Camp, 401 U.S. 617, 91 S.Ct. 1091, 28 L.Ed.2d 367 (1971). Contrary to plaintiffs' assertion, all of these cases involve statutes directed at restricting entry into a given field or business. Even in *Clarke*, where a trade association representing securities brokers asserted that a decision to allow two national banks to open a discount brokerage operation violated anti-branching laws, the Court found standing because the statute was passed in part due to congressional fear that national banks might obtain monopoly control of credit and money if permitted to branch unrestricted. 479 U.S. at 402, 107 S.Ct. at 758. Because those plaintiffs' members competed with banks in providing discount brokerage services, the Court found that Congress arguably had legislated against the competition that plaintiffs sought to challenge. *Id.* at 403, 107 S.Ct. at 759. This intent to restrict entry was what made plaintiffs "very reasonable candidates to seek review." *Id.* As noted, Congress had no such intent when it passed the FCUA.

CONCLUSION

For these reasons, the court finds that plaintiffs lack prudential standing to challenge the action of the NCUA. Accordingly, defendant's motion to dismiss is granted and the case is dismissed.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, et al.
Appellants,
v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.
Appellees.

BEFORE:Ginsburg and Tatel, Circuit Judges,
and Buckley, Senior Circuit Judge

[Filed October 23, 1996]

ORDER

Upon consideration of appellees' petitions for rehearing filed on September 13 and September 16, 1996, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, et al.
Plaintiffs,

v.

NATIONAL CREDIT UNION ADMINISTRATION, et al.
Defendants.

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson Randolph, Rogers and Tatel, Circuit Judges

---

[Filed on October 23, 1996]

ORDER

Appellees' Suggestions For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of either suggestion. Upon consideration of the foregoing, it is

ORDERED that the suggestions are denied.

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX G

5 USC § 702

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

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Current through P.L. 104-207, approved 9-30-96

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2)

confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX H

12 USC § 1759 (Section 109 of the FCUA)

UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 14--FEDERAL CREDIT UNIONS
SUBCHAPTER I--GENERAL PROVISIONS

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Current through P.L. 104-207, approved 9-30-96

§ 1759. Membership

Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district. Shares may be issued in joint tenancy with right of survivorship with any persons designated by the credit union member, but no joint tenant shall be permitted to vote, obtain loans, or hold office, unless he is within the field of membership and is a qualified member.

APPENDIX I

RULES and REGULATIONS

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 707, 708, and 745

[NCUA IRPS 82-1]

Membership in Federal Credit Unions; Interpretative Ruling and Policy
Statement

Tuesday, April 20, 1982

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interpretative ruling and policy statement.

SUMMARY: The NCUA Board has adopted a policy statement clarifying its interpretation of Sections 107(14) and 109 of the Federal Credit Union Act (12 U.S.C. 1757(14) and 1759) to (1) permit a Federal credit union, which purchases the loans of a liquidating credit union, to offer membership to the borrowers whose loans have been purchased, and (2) authorized the granting of charters, charter amendments, conversions to Federal charters, and mergers to credit unions which desire to serve multiple occupational groups. This action was taken in response to interest expressed by credit unions. It is intended to clarify NCUA's policy on membership in Federal credit unions, to make portfolios of loans sold by the National Credit Union Share Insurance Fund more attractive to potential Federal credit union purchasers,

and to ensure the continued availability of credit union service.

EFFECTIVE DATE: April 1, 1982.

ADDRESS: National Credit Union Administration, 1776 G Street, NW., Washington, D.C. 20456.

FOR FURTHER INFORMATION CONTACT:

Charles Filson, Director, Office of Programs, at the above address or telephone (202) 357-1130.

Interpretative Ruling and Policy Statement (IRPS) 82-1

a. A Federal credit union which purchases the loans of a liquidating credit union may offer full membership rights and services to the borrowers whose loans it has purchased. Accordingly, the purchasing Federal credit union must apply for and obtain an appropriate amendment to section five of its charter.

b. With respect to applications or requests for multiple occupational type Federal credit union charters, charter amendments, conversions to Federal charters, and mergers, the NCUA Board hereby authorizes the NCUA Regional Directors to approve or disapprove these applications/requests in accordance with the following guidelines.

1. The occupational groups to be included (new charter) or added (amendment, merger, conversion) have specifically requested credit union service.

2. The applicant demonstrates that credit union service can be provided and that each group wishes to be served by the applicant.

3. All the occupational groups to be included (new charter) or added (amendment, merger, conversion) are located within a well defined area.

4. The applicant has adequately supported the proposal as economically feasible and advisable.

In all cases of disapproval of a select employee group application, the Regional Director will advise the applicant of the reason(s) for disapproval and of the right to appeal the decision to the NCUA Board.

By the National Credit Union Administration Board, April 1, 1982.

Dated: April 12, 1982.

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

Nos. 96-843, 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS FIRST NATIONAL BANK AND TRUST CO., ET AL., IN OPPOSITION

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December 30, 1996

31 pp

QUESTIONS PRESENTED

1. Whether banks that compete for customers against federal credit unions, and their trade association, have standing to challenge decisions of the National Credit Union Administration permitting federal credit unions to expand their fields of membership in violation of the "common bond" requirement of the Federal Credit Union Act, 12 U.S.C. § 1759.

2. Whether the "common bond" requirement is violated when an "occupational" federal credit union accepts members who have no "common bond of occupation" with the existing membership.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENTS FIRST NATIONAL BANK AND TRUST CO., ET AL., IN OPPOSITION

STATEMENT [1]

The Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1751 *et seq.*, governs the chartering and regulation of federal credit unions and delegates regulatory authority to the National Credit Union Administration ("NCUA"). Section 109 of the FCUA, 12 U.S.C. § 1759, provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." This case concerns federal credit unions claiming a "common bond of occupation."

For nearly fifty years, the NCUA and predecessor agencies interpreted this requirement to mean that all the members of any one "occupational" federal credit union must share a single "common bond of occupation." In 1982, the NCUA altered this interpretation and began approving applications by occupational federal credit unions to serve groups of people who do not share "a common bond" with the existing members. The NCUA stated in substance that, since the Act speaks of "groups [plural] having a common bond," a single credit union may serve several groups, each with its own bond,

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[1] Pursuant to Rule 29.6, the parents and subsidiaries (except wholly-owned subsidiaries) of the respondents are as follows:

The parent company of respondent First National Bank and Trust Company is FNB Corp. The parent company of respondent Lexington State Bank is LSB Bancshares, Inc. Neither of these respondents has subsidiaries other than wholly-owned subsidiaries. Respondent Randolph Bank and Trust Company has no parent; Corporate Data Services, Inc. is its only subsidiary (other than wholly-owned subsidiaries). Respondent American Bankers Association has no parent companies or subsidiaries (other than wholly-owned subsidiaries). United Carolina Bank is the successor to the original plaintiffs Piedmont State Bank and Bankers Trust of North Carolina. Its parent company is United Carolina Bancshares Corp. It has no subsidiaries that are not wholly-owned.

and need not limit its membership to people sharing "a [single] common bond." 47 Fed. Reg. 16,775 and 26,808 (1982).

Respondents filed this suit in 1990, alleging that these NCUA approvals of credit union expansions violated the common bond requirement. The district court dismissed for lack of "prudential" standing, but the court of appeals reversed and this Court denied certiorari. Pet. App. 15a,[2] *cert. denied sub nom. AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). On remand, the district court ruled for the defendants, but the court of appeals again reversed, holding that (1) "the intent of the Congress is clearly discernible from the statutory text and the purpose of the statute"; and (2) Congress intended that "all the members of a credit union [must] share a single common bond." Pet. App. 6a, 10a.

1. The Federal Credit Union Act became law on June 26, 1934. Then and since, Congress has bestowed on federal credit unions certain advantages not enjoyed by their commercial bank competitors. *See, e.g.*, 12 U.S.C. § 1768 (exempting credit unions from taxation); 12 U.S.C. § 2902 (exempting credit unions from the Community Reinvestment Act); 12 U.S.C. § 1770 (allotting space in federal buildings to credit unions serving federal employees). But Section 109 of the FCUA imposes an important restriction on federal credit union activity: in pertinent part, it limits federal credit union membership to "groups having a common bond of occupation."

There was an express reason for this requirement. Credit unions were designed to be cooperatives, owned and managed by their members, that would enable persons of limited

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[2] All citations to "Pet. App." refer to NCUA Pet., No. 96-843.

resources to pool their funds for saving and lending among themselves.[3/] As the Senate Report on the Act stated,

> A credit union is a cooperative society, organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, limited in *each* case to the members of a specific group with *a* common bond of occupation or association.[4/]

This common bond, the NCUA has explained, "is the sharing of some unifying factor or characteristic among persons that simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8285 (1980). The NCUA thus ruled that an occupational credit union could serve more than one "group" (*e.g.*, the employees of each of several affiliated companies), but all members had to share the same "common bond" (*i.e.*, the same corporate family). *Id.* As NCUA's predecessor agency explained:

> Common bond is that pre-existing condition which causes the members of a group to associate together, to know each other, to have common interests and purposes, and to be able and willing to work together to accomplish group

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[3/] *See generally* NCUA, Studies in Federal Credit Union Chartering Policy § 1 (July 1979), C.A. App. 476.

[4/] S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis added), C.A. App. 52. At the introduction of S. 1639, which ultimately became the Act, Senator Sheppard proffered an accompanying statement that described a credit union as "organized within and in each case limited to *a specific group of people*. . . . No one outside the specific group can have anything to do with the specific credit union." 77 Cong. Rec. 3206 (1933) (emphasis added).

> objectives. A group has a common bond when it is composed of people who have the same employer, or are otherwise associated through some common interest or enterprise, and are so situated in relation to each other as a consequence of that community of employment or association that they could be expected to operate effectively as a cooperative organization for credit union purposes.[5/]

Credit unions are not necessarily required to be small institutions, but they are required to define their membership by the common bond. As the drafter of the model act on which the FCUA was based told Congress:

> [A] credit union first, as I have said, is a bank organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. *It is, however, confined to employees of the New England Telephone & Telegraph Co.*[6/]

In 1982, however, the NCUA revised its field of membership policy. Under the new rules, a single federal credit union may serve members of an unlimited number of occupational

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[5/] Department of Health, Educ., and Welfare, "Organizing a Federal Credit Union" 3 (May 1967); *quoted in Board of Directors and Officers, Forbes Federal Credit Union v. NCUA*, 477 F.2d 777, 783 (10th Cir.), *cert. denied*, 414 U.S. 924 (1973).

[6/] *Credit Unions: Hearings on S. 1639, S. 1640, and S. 1641 Before a Subcomm. of the Sen. Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (emphasis added) (statement of Roy F. Bergengren); *see* NCUA Pet. 24 (eliding the last sentence quoted above).

groups, and the members of one group need not have anything in common with the members of another. 47 Fed. Reg. 16,775 and 26,808 (1982) *See* NCUA Interpretive Regulation and Policy Statement (IRPS) *94-1*, 59 Fed. Reg. 29,066, 29,075-76 (1994).

The change is dramatic: any single federal credit union could, without violating the NCUA's current interpretation of the common bond requirement, serve every person in the United States who is employed (and, by virtue of other NCUA interpretations, every family member of every employed person).[2/]

2. One credit union that took advantage of the new policy was AT&T Family Federal Credit Union ("ATTF") in North Carolina. ATTF was chartered in 1952 with a field of membership limited to "Employees of the Radio Shops of Western Electric Co., Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." The people within this field of membership shared the common bond of occupation (namely, employment by Radio Shops) required by the FCUA.

Pursuant to the NCUA's revised policy, ATTF later began serving customers not employed by AT&T, including employees of a Coca Cola bottler, Black & Decker Corp., Duke

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2/ *See* 59 Fed. Reg. 29,066, 29,079 (1994) (family members of those within common bond eligible for credit union membership). The NCUA's regulations recognize that it may not permit a credit union to be established with a membership defined generally to include employees of all firms, because there is "[n]ot the same occupational bond" among them all. 59 Fed. Reg. at 29,076 (1994). However, the NCUA would deem the same membership to be eligible for a "multiple group charter" if it were defined by listing the "names of firms," *e.g.*, ABC Inc., DEF, Inc., GHI, Inc., *etc. Id.*

Power Co., and American Tobacco Co. ATTF also became a multi-state operation, serving its customers ("members," in credit union parlance) with branches in many states. At the time of the decision below, ATTF had "112,000 members in more than 150 disparate occupational groups spread across all 50 states." Pet. App. 4a-5a.

3. Respondents are four North Carolina banks and the American Bankers Association (a national trade association for banks). In 1990, respondents filed suit against the NCUA in the U.S. District Court for the District of Columbia, alleging that the multiple-bond policy is contrary to the FCUA, and asking specifically that recent NCUA approvals of expansion requests by ATTF be set aside as "arbitrary, capricious, or otherwise in violation of law."

In 1991, the district court dismissed, ruling that, although respondents had constitutional standing, they lacked "prudential standing." Pet. App. 32a-42a. The court of appeals reversed. It agreed that there was no issue of constitutional standing ("that [respondents] will suffer competitive or economic injury is not in doubt," Pet. App. 20a), and it held that respondents satisfied the requirements for prudential standing as well. Pet. App. 15a-31a.

The court of appeals noted that the common bond requirement is a congressionally imposed limit on credit union activity: "Like more classic entry restrictions, the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market." *Id.* 24a-25a. The court then held that, under this Court's precedents, competitors have standing to enforce such a limit. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617, (1971) *("ICI")*; and *Association of Data Processing*

Servs. Orgs. v. Camp, 397 U.S. 150, (1970). The court of appeals read these cases as standing for "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. 24a.[8/]

Importantly, the court of appeals rejected NCUA's attempt to invoke that court's earlier decision in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989). *See* Pet. App. 25a. In *HWTC IV*, the court had held that the interests of hazardous waste treatment firms "were not sufficiently congruent with those of the intended beneficiaries of the [relevant EPA act]" to allow them to sue to force the EPA to adopt stricter environmental regulations. *Id.* 25a-26a. Concluding here that "this case is a good deal closer to the paradigm of *ICI* and *Clarke* than it is to *HWTC*," *Id.* 29a, the court of appeals held that respondents had standing to challenge the NCUA's actions and remanded for proceedings on the merits. Intervenors ATTF and Credit Union National Association, a credit union trade group, sought a writ of certiorari, but this Court denied the petition.[9/]

4. On remand, on cross-motions for summary judgment on the merits, the district court ruled that "the common bond provision was not the defining characteristic of a credit union,"

[8/] The court noted that this Court allowed investment firms or their trade association to enforce competitive restrictions imposed on banks by the Glass-Steagall Act and the McFadden Act, even though those statutes were not meant "to insulate investment bankers . . . from competition." Pet. App. 23a, *citing Clarke*, 479 U.S. at 388 & n.13; and *ICI*, 401 U.S. at 618-19.

[9/] *See AT&T Family Federal Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993).

Pet. App. 51a, and that "[t]he NCUA was given a mandate to provide more flexible and innovative regulation in the face of changing economic conditions." *Id.* 53a (internal quotations and citations omitted). It then upheld the NCUA's construction as a "reasonable construction of an ambiguous statute." *Id.* 54a.

On July 30, 1996, the court of appeals again reversed the district court. The court ruled that the common bond provision unambiguously requires that all the members of any one federal credit union must have a single common bond. This construction, the court found, is required by the text of the common bond requirement (which the NCUA's interpretation "would drain . . . of all meaning" Pet. App. 10a) and the Act's purpose "to unite credit union members in a cooperative venture." Pet. App. 12a (brackets and citations omitted). The court of appeals also concluded that the "common bond" requirement must be read consistently with the parallel clause relating to "community" credit unions, whose membership (NCUA agreed) is limited to a single community. Pet. App. 8a-9a. Thus, the statutory requirement that "credit union membership shall be limited to groups having a common bond of occupation . . . or to groups within a well-defined neighborhood, community, or rural district" would allow credit unions of either kind to include more than one group, but all of the constituent groups must share a single common bond of occupation or a single geographic community. The court accordingly found the NCUA's construction, under which a single occupational credit union could serve an unlimited

number of employer groups with disparate occupational bonds, to be impermissible. *Id.* 14a.[10/]

ARGUMENT

I. THE COURT OF APPEALS DECISION ON STANDING WAS A STRAIGHTFORWARD AND CORRECT APPLICATION OF THIS COURT'S DECISIONS.

The decision below was a routine and correct application of this Court's competitor standing jurisprudence. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987) ("*Clarke*"); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970); *Association of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150 (1970). The court of appeals held that respondents have standing under the doctrine set forth in *ICI* and *Clarke*, *see* Pet. App. 22a, and not because of any special circuit rule on standing. There is no live conflict between courts of appeals on competitor standing, and no new or important "standing" issue is presented.

[10/] The mandate of the court of appeals was expedited in light of statements by the NCUA that it would not follow the decision, and an injunction was entered by the district court on October 25 (modified slightly on October 31). Pet. App. 55a-65a. Subsequently, the district court enjoined *pendente lite* the implementation of a regulation issued by the NCUA, without public notice or comment, in response to the district court's action, 61 Fed. Reg. 59,305 (1996), on the ground that it was adopted in violation of the Administrative Procedure Act and "with specific intent to circumvent the terms of this Court's Orders." App. 1a. On December 24, the court of appeals stayed the district court's orders dated October 25 and 31 insofar as they may bar "enrolling new members of existing occupational groups" and refused other relief requested by the NCUA. App. 3a. The NCUA's statement, NCUA Pet. 13, that a motion is pending in the district court concerning "retroactive divestiture of [credit union] groups or members who do not share a common bond with the core group" is incorrect.

There is no dispute that respondents suffered actual injury and have constitutional standing. Pet. App. 20a. The issue below was whether, under this Court's "zone of interests" test for "prudential standing" to challenge agency action under the Administrative Procedure Act, banks have standing as competitors to enforce statutory limits on the activities on credit unions. The court of appeals answered that question "yes" in a straightforward application of *ICI* and *Clarke*.

In both of those cases, the Court held that trade associations of securities firms had prudential standing to challenge agency approvals of activities of commercial banks that allegedly violated the banking statutes. As NCUA's petition acknowledges, "In *Clarke*, this Court upheld the standing of the securities dealers because they were attempting to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by national banks." NCUA Pet. 18; *citing* 479 U.S. at 403. Similarly here, the banking industry respondents have standing to enforce a requirement that was intended by Congress to limit the reach and scope of services offered by credit unions. The NCUA argues that this case is different because the purpose of the Federal Credit Union Act is "to promote the accessibility and growth of federal credit unions." NCUA Pet. 18. But that is not an answer to *Clarke* and *ICI*: The "common bond" requirement of the FCUA is explicitly a limit on credit union reach, just as the Glass-Steagall Act and the McFadden Act are limits on bank activities. The subject of this case is the delineation of those limits, just as *Clarke* and *ICI* concerned the delineation of similar limits in the banking laws.

Petitioners contend that this case lies outside *Clarke* and *ICI* because Congress did not say that the FCUA was intended to

protect banks. NCUA Pet. 16-17. But *Clarke* rejected exactly this argument:

> [In *ICI*] there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks. . . . [I]t was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398. *Clarke* went on to summarize the "zone of interests" test as *not* requiring any "indication of congressional purpose to benefit the would-be plaintiff." *Id.* at 399-400.

The decision below is in accord with other reported decisions of the circuit courts on competitor standing that post-date *Clarke*,[11/] including a case involving FCUA standing issues identical to this one. *See Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1994). In particular, there is no live conflict with Fourth Circuit jurisprudence. Though

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[11/] *See Scheduled Airline Traffic Offices v. DOD*, 87 F.3d 1356 (D.C. Cir. 1996); *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993) (out-of-state milk producers have competitor standing to challenge constitutionality of state milk pricing order); *DeLoss v. HUD*, 822 F.2d 1460 (8th Cir. 1987) (owners of rental property have competitor standing to challenge Department's decision, under § 202 of the Housing Act, to finance a housing project); *see also NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co. ("VALIC")*, 513 U.S. 251 (1995) (implicitly finding that the insurance industry has competitor standing to challenge regulations allowing banks to sell insurance); *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco & Firearms*, 860 F.2d 229, 233 (7th Cir. 1988) (alcoholic beverage retailers have standing to allege that BATF regulations unfairly constrained distributors in their dealings with retailers).

petitioners correctly state that *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), reached a contrary conclusion, that case was decided before *Clarke* and has not since been followed by the Fourth Circuit or any other Circuit on the competitor standing issue presented here. As the court of appeals stated, Pet. App. 24a n.3, *Branch Bank* did not survive *Clarke*; it was part of a line of cases, limiting standing to express beneficiaries of a statutory restriction, that was specifically overruled in *Clarke*. *See* 479 U.S. at 400 n.15.[12/]

Finally, nothing in the decision below suggests that it was based on a body of special D.C. Circuit doctrine that is "easier" than, or contrary to, *Clarke* and *ICI*. The court of appeals did discuss its "suitable challenger" test as elaborated in *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989) (finding no standing to challenge agency action by a non-competitor who was not a "suitable challenger"). But the court was quite clear that its decision upholding standing in *this* case was based on *Clarke* and *ICI*. It went on to address "suitable challenger" because "appellees [petitioners here] . . . claim [it] was *stricter* than . . . *Clarke* . . . ." Pet. App. 26a (emphasis added). It found that test inapplicable and "the

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[12/] The *Clarke* footnote refers to the line of cases exemplified by *Control Data Corp. v. Baldrige*, 655 F.2d 283, 293-94 (D.C. Cir.), *cert. denied*, 454 U.S. 881 (1981), on which *Branch Bank* specifically relied. *See* 786 F.2d at 625. In stating that it was overruling these cases, the *Clarke* Court said: "The [zone of interests] test is not meant to be especially demanding." 479 U.S. at 399. *Control Data* and other similar cases were rejected as being "inconsistent with our understanding of the 'zone of interests' test, as now formulated." *Id.* at 400 n.15.

paradigm of *ICI* and *Clarke*," controlling.[13] *See* Pet. App. 29a. It is quite inappropriate for petitioners now to suggest that the court of appeals followed an indulgent "suitable challenger" test rather than this Court's decisions in *Clarke* and *ICI*.

II. THE COURT OF APPEALS' INTERPRETATION OF THE COMMON BOND REQUIREMENT WAS DICTATED BY "TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION," WAS CORRECT, PRESENTS NO CONFLICT WITH OTHER CIRCUITS, AND RESOLVES A CONSTRUCTION QUESTION UNIQUE TO THIS STATUTE AND OF NO WIDER IMPORTANCE.

On the merits, the court of appeals properly applied the *Chevron*[14] test to an agency's revised interpretation of a non-technical statututory requirement. Employing the "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9; *see Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990), and starting with the language of the statute, the court concluded that the new interpretation conflicted with an unambiguous statutory mandate. Its invalidation of NCUA's actions was wholly appropriate in light of that conclusion. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S.

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[13] Although petitioners feign surprise, it is obvious why the court of appeals did not cite *Air Courier Conf. of Am. v. American Postal Workers Unions, AFL-CIO*, 498 U.S. 517 (1991): *Air Courier* was not a competitor standing case. In any event, what *Air Courier* says is this: "*Clarke* is the most recent in a series of cases in which we have held that competitors of regulated entities have standing to challenge regulations." *Id.* at 529. That is precisely what the court below held.

[14] *Chevron, U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984).

361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"); *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter").

The provision at issue says, "Federal credit union membership shall be limited to groups having a common bond of occupation . . . ." Only two readings of this provision have been suggested. The court of appeals' reading fits the language and makes sense: a credit union may have members from one or more occupational groups as long as they all have "a" common bond that "simultaneously links them together and distinguishes them from the general public." 45 Fed. Reg. 8285 (1980). NCUA's current reading does not fit the language and makes no sense: a credit union may have members drawn from one or more groups, including "groups" of just one or two people, that need not share "a" common bond; on that reading every person in the United States who has a job with *any* employer (or has a family member who is employed) could be a member of the same federal credit union without violating the requirement, which, under this construction, serves no discernible purpose.

The court of appeals was also correct in concluding that the NCUA's current interpretation could not be made to fit the structure of the sentence in which the common bond requirement is set forth. That sentence states that federal credit union membership is restricted to (a) "groups having a common bond of occupation or association," *or* (b) "groups within a well-defined neighborhood, community, or rural district." The NCUA has always agreed that, while a community credit union may include plural "groups," all must necessarily share "a" — *i.e.*, one — community, or else the credit union could expand

to fill the map. The parallel phrasing similarly requires that, while an occupationally-defined credit union may contain plural "groups" (*i.e.*, from affiliated employers), all must share "a" — one — common bond.

Petitioners assert that the NCUA's policy "promotes the congressional purposes expressed in the [Act]," NCUA Pet. 22.[15/] But at best, "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Dimension Financial*, 474 U.S. at 373-74. And one of the purposes clearly expressed in the text and legislative history of this statute was to limit federal credit union membership to persons having certain relationships that Congress thought would enable them to trust and rely on each other. As the court of appeals ruled, NCUA simply prefers to leave that limiting purpose of the statute out of account.

Chevron does not call for deference to agency interpretations unless the court determines, after applying "traditional tools" to discern congressional intent, that the intent is unclear *and* concludes that the agency's construction is reasonable. *See, e.g., Smiley v. Citibank (South Dakota)*, N.A., __ U.S. __, 116 S. Ct. 1730 (1996); INS *v. Cardoza-*

[15/] The NCUA cites *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813-14 (1995) ("*VALIC*"), arguing that the NCUA's multiple-bond policy merely "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design." NCUA Pet. 22. Unlike *VALIC*, however, where the Comptroller of the Currency interpreted the phrase "all such incidental powers as shall be necessary to carry on the business of banking," this is not a case where an agency gave content to an open-ended provision. Here, the NCUA simply abandoned the reading dictated by language, context, and purpose in favor of a reading that renders the words at issue nugatory.

Fonseca, 480 U.S. 421, 447-48 (1987). Petitioners' problems are that the "traditional tools" — language and purpose of the provision — do dictate the answer here, and NCUA's interpretation is incorrect because it would deprive the "common bond" requirement of all substance.

The question presented is unique to the Federal Credit Union Act. The fact that credit unions are affected by the issue is not a reason for this Court to review the court of appeals' decision in the absence of a conflict. In just the last few weeks, courts of appeals have invalidated important regulations of a number of federal agencies as violative of unambiguous statutory mandates, including regulations affecting labor,[16/] Medicaid,[17/] and legal aliens.[18/] This Court of course does not routinely provide a second level of review in such cases.

Petitioners also argued below that a meaningful common bond provision would be inconsistent with today's realities, but Judge Ginsburg fully answered this argument: "if this [single-bond] conception of an FCU seems dated in the world of ATMs and nearly nationwide financial institutions of a scale surely unimaginable in 1934, . . . then the case for updating the FCUA

[16/] *See L.P. Cavett Co. v. United States Dep't of Labor*, No. 95-3902, 1996 WL 688966 (6th Cir. Dec. 3, 1996) (Department of Labor regulation implementing the Davis-Bacon Act).

[17/] *See Cabell Huntington Hosp., Inc. v. Shalala*, No. 95-3095, 1996 WL 682215 (4th Cir. Nov. 27, 1996) (HHS regulation regarding Medicare reimbursement); *Legacy Emanuel Hosp. and Health Ctr. v. Shalala*, 97 F.3d 1261 (9th Cir. 1996) (same).

[18/] *See Hernandez v. Reno*, 91 F.3d 776 (5th Cir. 1996) (INS regulation implementing the Immigration Act).

must be addressed to Congress."[19/] Respondents note that the policy issue before Congress would not be whether credit union services will be broadly available: they are universally available, through numerous state-chartered credit unions not affected by the decision below,[20/] as well as federal community credit unions and federal occupational and associational credit unions complying with the common bond requirement. The policy issue for Congress would be whether it wishes to permit federally chartered credit unions to add members across the nation without any common bond limitation. That is, as Judge Ginsburg said, not an issue for the courts.

Finally, there is no conflict between the decision below and any other appellate decision. The NCUA makes the extraordinary argument, NCUA Pet. at 29, that this Court should anticipate the possibility of a conflict with a case pending in the Sixth Circuit because the plaintiffs in that case might not choose to petition from an adverse decision. But *if* a conflict develops, and *if* thereafter petitioners lose *any* case, petitioners will be able to give this Court the opportunity to consider the issue. There is no reason to anticipate in this case a possible

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[19/] Pet. App. 12a; *see also Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986):

> What is really troubling respondents, of course, is their sense that state regulators will not allow them sufficient revenues. While we do not deprecate this concern, § 152(b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute.

[20/] Federal credit unions operating in states that do not impose a common bond requirement for state-chartered credit unions may convert their charters, *see* 12 U.S.C. § 1771, and, if press reports are accurate, many have already taken steps toward doing so.

future conflict calling for this Court's attention when — on petitioners' own view of the matter — the issue will cease to arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 30, 1996

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NO. 90-2948

FIRST NATIONAL BANK AND TRUST
COMPANY, ET AL., PLAINTIFFS

v.

NATIONAL CREDIT UNION
ADMINISTRATION, ET AL., DEFENDANTS

NO. 96-2312

AMERICAN BANKERS ASSOCIATION, ET AL.,
PLAINTIFFS,

v.

NATIONAL CREDIT UNION
ADMINISTRATION, DEFENDANTS

[Filed: December 4, 1996]

ORDER

In accordance with the proceedings in open court at the status conference and motions hearing of December 4, 1996, and upon consideration of the record before the Court, the Court having found, for essentially the reasons set forth by plaintiffs and those expressed orally by the Court, that defendant National Credit Union Administration ("NCUA") adopted its recently promulgated regulation of November 14, 1996, entitled Interim Field of Membership Policy ("IRPS") 96-2, collusively with co-defendant intervenors; in violation of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*; and with specific intent to circumvent the terms of this Court's Orders of October 25, 1996, and October 31, 1996, it is, this 4th day of December, 1996,

ORDERED, that plaintiffs' motion for immediate enforcement of the Court's Orders of October 25, 1996, and October 31, 1996, is granted, and any further implementation of IRPS 96-2, is enjoined, *pendite lite*, or subsequent order of Court; and it is

FURTHER ORDERED, that any approval henceforth of requests for occupational federal credit union membership made pursuant to NCUA's purported redefinition of "core membership" or "common occupational bond," *see* IRPS 96-2, other than as defined by the Order of October 31, 1996, including further implementation of the 31 requests reportedly already approved by NCUA pursuant to the agency's new policy, are enjoined, *pendite lite*; and it is

FURTHER ORDERED, that plaintiffs' request for an expedited Rule 16 conference is denied as moot; and it is

FURTHER ORDERED, that the motions of defendant and defendant intervenors for a stay or, in the alternative, a partial stay, pending appeal of the Court's Orders of October 25 and October 31, 1996, and possible Supreme Court review of *First*

National Bank and Trust Co. v. National Credit Union Adm'n, 90 F.3d 525 (D.C. Cir. 1996), is denied; and it is

FURTHER ORDERED, *sua sponte*, that a stay of this Order pending appeal is denied; and it is

FURTHER ORDERED, that counsel for all parties furnish courtesy copies to this Court of all papers filed in the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court in connection with these cases, and keep this Court apprised of significant action thereon; and it is

FURTHER ORDERED, that these cases are scheduled for an initial status and scheduling conference pursuant to Fed. R. Civ. P. 16 and D.D.C. Rule 206 on January 29, 1996, at 9:30 a.m.

/s/ Thomas Penfield Jackson
Thomas Penfield Jackson
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 96-5347
CONSOLIDATED WITH 96-5348, 96-5349, 96-5350,
96-5351, 96-5352

PIEDMONT STATE BANK, ET. AL.,
APPELLEES

v.

NATIONAL CREDIT UNION
ADMINISTRATION, ET AL., APPELLEES

NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS,
APPELLANT

BEFORE: Ginsburg, Sentelle, and Rogers, Circuit Judges

[Filed December 24, 1996]

ORDER

Upon consideration of the motions to stay, the alternative motions for a partial stay, the opposition to the motions to stay, and the replies to the opposition, it is

ORDERED that so much of the October 25, 1996 and October 31, 1996 district court orders that bar a credit union from enrolling new members of existing occupational groups that do not share a common occupational bond with the credit union's core membership, be stayed pending appeal, or resolution of the petitions for *certiorari* filed by the National Credit Union Administration and the AT&T Family Federal Credit Union in the United States Supreme Court in the matter of *First National Bank and Trust Co. et al. v. National Credit Union Admin.*, 90 F.3d 525 (D.C. Cir. 1996), *petitions for cert. filed*, 65 U.S.L.W. 3416 (U.S. Nov. 26, 1996) (No. 96-843) and (U.S. Nov. 27, 1996) (No. 96-847). To the extent that the movants seek to stay other aspects of the district court's orders, their motions are denied. It is

FURTHER ORDERED, on the court's own motion, that the parties file motions to govern further proceedings herein within fourteen days of the Supreme Court's resolution of the petitions for *certiorari*.

/s/ Mark J. Langer
FOR THE COURT:
Mark J. Langer, Clerk

No. 96-847

(5)

Supreme Court, U.S.
FILED
JAN 3 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

AT & T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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A. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denial of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5 (1983) 4

INTRODUCTION

In our petition, we showed that certiorari is warranted to review the court of appeals' application of its own "suitable challenger" doctrine to confer standing on parties whose interests are squarely opposed to those that Congress intended to protect through the Federal Credit Union Act ("FCUA"), as well as to review the court's determination that the agency's interpretation of the statute entrusted to its administration was entitled to no deference in light of the purported clarity of the statutory language. Tellingly, the Banks have declined to defend the court of appeals' reasoning on its own terms in either respect. Instead, they contend that the court -- contrary to its own statements -- did not actually apply an alternative route to standing, and they attempt to defend the court's merits determination on grounds that the court itself expressly rejected. The Banks do not dispute the critical importance of this case to the entire credit union movement, and their studious avoidance of the court of appeals' reasoning only underscores the need for this court's review.

ARGUMENT

1. In its standing decision, the court of appeals stated that "[l]itigants can qualify as 'protected' by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers * * *." Pet. App. 30a, NCUA Pet. App. 21a. The court then rejected the Banks' "claim that they qualify as intended beneficiaries as suitable challengers under the FCUA," and went on to address "the more subtle question, whether banks can be thought suitable challengers to enforce a requirement designed to benefit the members * * * of credit unions." Pet. App.

30a-32a, NCUA Pet. App. 21a-22a. The court held that the Banks had standing as suitable challengers because they "can be thought to have interests 'systematically aligned' with those the statute is designed to benefit." Pet. App. 36a, NCUA Pet. App. 28a. In its subsequent decision on the merits, the court of appeals recognized that its prior decision had upheld standing "on the ground that the banks are 'what we have termed suitable challengers * * *.'" Pet. App. 5a (quoting Pet. App. 30a), NCUA Pet. App. 5a (quoting NCUA Pet. App. 21a).

We restate the court of appeals' decision to show that the Banks evidently have no desire to defend it on its own terms. The Banks try to paint the standing decision as a "routine" and "straightforward" ruling, Opp. 10, 11, but the court itself acknowledged that the issue was "devilishly complex." Pet. App. 37a, NCUA Pet. App. 29a. Most remarkably, the Banks try to suggest that the standing decision was not based on the D.C. Circuit's "suitable challenger" doctrine, Opp. 13, when -- as set forth above -- both the standing and merits decisions expressly recognized that standing was granted to the Banks as "suitable challengers." Pet. App. 5a, 31a; NCUA Pet. App. 5a, 22a.[1/]

[1/] The Banks' disingenuous suggestion that the "suitable challenger" doctrine arose only because it was argued by petitioners, Opp. 13, is rather readily rebutted by the court of appeals itself, *see* Pet. App. 30a, NCUA Pet. App. 21a (Banks "claim that they qualify * * * as suitable challengers under the FCUA"); *see also* Brief for Appellants at 32-37, *First National*

(footnote continued to next page)

The court of appeals certainly did try to find support for its suitable challenger test in this Court's standing precedents, but, as we explained in the petition, the D.C. Circuit's test goes far beyond those cases. Pet. 12-16. The extent of the departure is clearly demonstrated by this case. In *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), and *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971), standing was conferred on competitors because the purpose of the provisions in question was to limit competition, *see* 479 U.S. at 403, 401 U.S. at 20; *see also* Pet. 15. In stark contrast, however, the decision below confers standing on credit union competitors in the absence of any such showing and in the face of a recognition that the purpose of the common bond provision was to strengthen and promote credit unions -- hardly an objective shared by their competitors. Thus the D.C. Circuit's "suitable challenger" test turns the purpose of this Court's zone of interest test -- "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives," *Clarke*, 479 U.S. at 379 n.12 -- on its head.

2. Like the court below, the Banks try to minimize the conflict with the Fourth Circuit's decision in *Branch Bank and Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), by noting that the decision antedated this Court's decision in

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(footnote continued from previous page)

Bank and Trust Co. v. NCUA, Nos. 91-5262 & 91-5336 (D.C. Cir., filed August 18, 1992).

Clarke and arguing that the Fourth Circuit's decision did not survive *Clarke*. The Banks are wrong. *Clarke* recognized that the zone of interest test "[a]t bottom * * * turns on congressional intent." 479 U.S. at 400. The Fourth Circuit in *Branch Bank*, examining Congress' intent in enacting the common bond requirement, correctly held that "the interests of banks are far removed from the interests of the credit union members protected by these provisions." 786 F.2d at 625. In sharp contrast, the D.C. Circuit below held that the Banks "can be thought to have interests 'systematically aligned' with those the statute is designed to benefit." Pet. App. 36a, NCUA Pet. App. 28a. Nothing in *Clarke* mitigates this stark and irreconcilable conflict.

The subsequent history of *Branch Bank* confirms that it is fully consistent with *Clarke*. The losing bank in *Branch Bank* filed a petition for certiorari with this Court, which held the petition pending its decision in *Clarke*. On January 27, 1986 -- 13 days after announcing its decision in *Clarke* -- this Court disposed of the petitions being held for that opinion, including the one in *Branch Bank*. The Court's practice is to "GVR" -- grant certiorari, vacate the judgment, and remand for reconsideration -- a petition being held pending a Supreme Court decision if it is even arguable that the lower court decision is inconsistent with or affected by the Supreme Court decision. *See, e.g.*, A. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L.Q. 5, 23 (1983) ("the Court ordinarily issues reconsideration orders whenever the lower court's ruling is even arguably vitiated by the intervening decision and denies review only when the judgment is perceived as clearly in

accord with the plenary opinion"). The Court did not "GVR" the *Branch Bank* decision, but instead simply denied certiorari -- suggesting that it saw no inconsistency with its own decision in *Clarke*.[2/]

[2/] The Banks also argue that the court of appeals' decision on standing is in accord with other circuit court decisions, Opp. 12 n. 11, but the cases they cite do not support their point. *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993), did not involve a challenge under the Administrative Procedure Act, and the court merely held in passing that milk producers who ship in interstate commerce were within the zone of interests protected by the Commerce Clause. *Id.* at 919 n.7. Likewise, neither *DeLoss v. Department of Housing and Urban Development*, 822 F.2d 1460 (8th Cir. 1987), nor *Foremost Sales Promotions, Inc. v. Director, Bureau of Alcohol, Tobacco and Firearms*, 860 F.2d 229 (7th Cir. 1988), applied any analysis even remotely akin to the D.C. Circuit's suitable challenger doctrine. To the contrary, the courts in those cases found that specific statutory language evidenced Congress' intent to protect the plaintiffs' interests. *DeLoss*, 822 F.2d at 1464-65; *Foremost*, 860 F.2d at 233-34. The Banks note the Sixth Circuit decision conferring standing on banks to challenge NCUA's interpretation of the common bond provision on the ground that otherwise a challenge might not be brought, *Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1994), *see* Opp. 12, but do not attempt to defend its reasoning. See Pet. 20-21.

The other circuit court case cited by the Banks, *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.2d 1356 (D.C. Cir. 1996), only serves to demonstrate the aberrant nature of the D.C. Circuit's suitable challenger doctrine and its far-reaching effects. *See* Pet. 30 n.11. In that case, the court -- relying on its decision in the present case -- held that the plaintiffs were suitable challengers of an internal agency procurement policy even though the court expressly recognized that the plaintiffs' interests were not among those that Congress intended to benefit through the procurement statute at issue. 87 F.3d at 1359-60.

3. Just as with their discussion of the court of appeals' decision on standing, the Banks do not even attempt to justify the primary reasoning employed by the court in its decision on the merits. Instead, they seek to defend that decision on grounds the court itself rejected. The court was right to reject the grounds the Banks now attempt to resurrect, and the Banks' own failure to defend the actual basis for the court's decision underscores the need for this Court to review the indisputably important issues presented by this case.

In its ruling on the merits, the court of appeals invalidated NCUA's interpretation of the common bond provision based largely on its conclusion that the common bond concept is already implicit in what it believed to be the plain meaning of the word "group." As explained in our petition, the court erred because "group" does not necessarily imply significant commonality. In fact, the same dictionary the court cited for its version of the plain meaning of that word contains an alternative definition that does not imply commonality. *See* Pet. 23-24.

The Banks, in the proceedings below, did not advocate the analysis of the statutory language on which the court of appeals primarily relied, and they do not try to defend it in their opposition. Rather they argue that the singular article "a" in the phrase "having a common bond of occupation" requires that there be only one common bond per credit union. Opp. 15. The court of appeals quite properly rejected this argument, however, stating that: "The article 'a' could as easily mean one bond for each group as one bond for all groups * * *." Pet. App. 6a, NCUA Pet. App. 6a.

The Banks seek to support their argument that the singular article "a" is meaningful by quoting the part of the Senate Report on the Act which states that "a credit union is a cooperative society, * * * limited in each case to the members of a specific group with a common bond of occupation or association." Opp. 4. The Banks fail to mention, however, that it was the House bill that became law. *See* 78 Cong. Rec. 12079 (1934) (Senate accepted House "amendment" that resulted in striking out all after the enacting clause and inserting the House substitute language). The House Report described the common bond provision as follows: "Membership in Federal credit unions is limited to groups having common bonds of occupation or association * * *." H.R. Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934) (emphasis added). This directly supports NCUA's interpretation of the provision. At a minimum, it demonstrates that the provision at issue plausibly can be read two ways.[3/]

4. The Banks claim that NCUA's multiple group policy deprives the common bond requirement of all substance. This is incorrect. Under NCUA's policy, each occupational group within a multiple group credit union must have a common bond. These bonds, singly and together, serve as the "cement" uniting credit union

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3/ The Banks also contend that the court of appeals was correct in ruling that NCUA's interpretation could not be made to fit the structure of the provision. We addressed this point in our petition (at 25 n.9) and will not repeat our position here.

members in a common venture and producing a sense of shared responsibility that discourages default. Thus, NCUA's policy permitting multiple common bonds preserves the value that Congress intended the common bond provision to foster and, at the same time, advances Congress' primary objective for the Act as a whole: to make credit union services available to more people. *See* Pet. 27.

5. The Banks do not challenge in any way our showing with respect to the importance of the issues raised for the federal credit union system. They suggest instead that the federal credit union system is not that important. Thus, they blithely suggest that many federal credit unions impacted by the decision below could convert themselves to state-chartered institutions without serious consequences. Opp. 18. This ignores Congress' express rationale in creating the federal credit union system. Congress passed the Federal Credit Union Act to provide a federal alternative to the state system that already existed in 1934 with the objective of increasing credit union membership. It was aware that "the State laws differ in essential particulars and many of them are imperfect, rendering normal development impossible." S. Rep. No. 555, 72d Cong., 2d Sess. 2 (1934). Congress also sought to establish a means for credit unions "to escape overburdensome state taxation." *Id.* These considerations remain valid today and make conversion a poor alternative for many credit unions. While state credit union laws have become more similar over the years, significant differences still remain. These differences would have a particularly adverse impact on credit unions doing business in more than one state. In addition, many states impose taxes on state-chartered institutions from which federal credit unions remain exempt.

Finally, the Banks seek to deflect our showing that the court of appeals' interpretation of the common bond provision will deprive many consumers of access to credit union services by arguing that these services are "universally available." Opp. 18. This assertion is unsupported and untrue. A substantial percentage of consumers do not hold jobs or live in communities that provide them with the opportunity to join a credit union.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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Supreme Court of the United States
OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., ET AL,

and

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION, INC,
Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO. ET AL.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The National Association of Federal Credit Unions ("NAFCU") is a non-profit association whose members comprise approximately 900 federal credit unions located throughout the United States. The members of NAFCU, and the more than 8.6 million member-owners of these credit unions, are adversely affected by the decision below. NAFCU submits this Brief to emphasize the critical significance of the decision of the court of appeals to the future of the credit union community and to present additional legal reasons why the Petitions should be granted. This Brief is filed with the consents of all parties to the captioned cases, which are on file with the Clerk.

NAFCU member credit unions serve 51.9% of all federal credit union members and have $ 105.6 billion in shares outstanding. NAFCU represents the interests of these credit unions and their members on issues pending in Congress, Executive agencies and the courts. A majority of the credit unions represented by NAFCU have been authorized to expand their field of membership pursuant to the multiple occupational group policy of the National Credit Union Administration ("NCUA") which is the focus of this litigation. These and other NAFCU members also might wish to apply for additional expansions based on this policy in the future. Further, the credit unions represented by NAFCU and their member-owners are adversely affected by the threat presented by the decision below to the public's confidence in the credit union system and the integrity of the National Credit Union Share Insurance Fund ("NCUSIF"), a fund created by Congress, financed by credit unions, and administered by NCUA to provide insurance for member accounts.

SUMMARY OF ARGUMENT

This case involves one of the most important issues ever litigated with respect to credit unions. Resolution of the meaning of the "common bond" provision of the Federal Credit Union Act (12 U.S.C. §1759) will have a profound effect on the future of the federal credit union sector of the financial services industry, which as of June 1996 had over $320 billion in assets.

1. The decision below conflicts with this Court's rulings on prudential standing and creates a square conflict with Branch Bank & Trust Co. v. NCUA, 786 F.2d 621 (4th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). The D.C. Circuit concluded that banks "were not intended beneficiaries of the FCUA. (Pet. App. 16a).[1/] Under this Court's prior decisions, the case should have been dismissed for lack of standing.

The D.C. Circuit, however, found prudential standing under an alternative standard of its own creation, the "suitable challenger" test. While ostensibly derived from this Court's "competitor standing" cases, the "suitable challenger" doctrine focuses exclusively on the effects of granting a party standing, rather than on the intent of Congress as required by this Court's decisions. Further, in determining whether the effects of granting standing to banks satisfied its "suitable challenger" doctrine, the court of appeals mischaracterized the statute in a manner that ignored the reasons why this case is distinguishable from this Court's competitor standing decisions.

1/ All Appendix citations refer to the Appendices in No. 96-843.

The "suitable challenger" doctrine is both contentless and subject to arbitrary application. Yet the D.C. Circuit has applied this doctrine in a variety of cases decided under the Administrative Procedure Act. This case presents an appropriate opportunity to resolve a recurring issue of great significance about the application of prudential standing principles by the Circuit with the largest administrative caseload.

2. The court of appeals erred by failing to defer to the NCUA's interpretation of an ambiguous provision of its authorizing statute, in violation of Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The court also failed to consider the grant of authority in the first sentence of Section 1759, which is inconsistent with the "plain meaning" the court attributed to the "common bond" language in the exception clause attached to this provision. Taken as a whole, the text of Section 1759 supports NCUA's interpretation.

3. The D.C. Circuit's decision will have critical adverse effects on: (a) members of federal credit unions that have added multiple occupational groups to their field of membership under NCUA's policy, and underserved members of the public who will be denied access to financial services by that ruling; (b) credit unions that have added multiple occupational groups under that policy in the past or might wish to in the future; and (c) the National Credit Union Share Insurance Fund, which insures member shares in federal credit unions.

By limiting credit union membership to employees that share a single common bond, the decision below adversely affects the safety and soundness of many credit unions, by depriving them of the diversity in membership necessary to minimize risk and avoid the adverse effects of a downturn in a single underlying

company or industry. The decision also threatens to deprive credit unions, alone among all classes of federally insured financial institutions, of the ability to take advantage of the economies of scale that are essential to providing services to their members in a cost-effective manner. In addition, the threatened dismemberment of existing multiple employer credit unions creates a risk of capital losses that could ultimately result in increased outlays by the NCUSIF. By contrast, the NCUA's longstanding interpretation of the ambiguous language of Section 1759 furthers the goals of the statute by preventing these adverse effects.

I. THE STANDING DECISION DEPARTS FROM THIS COURT'S RULINGS AND CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT

The Court has stated repeatedly that in determining prudential standing, a reviewing court must examine Congress's intent in enacting the statute, in order to "determine whether [these plaintiffs] were meant to be within the zone of interests protected by those statutes." Air Courier Conference v. American Postal Workers Union, 498 U.S. 571, 524 (1991). A right to seek review is denied under the zone of interests tests "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be presumed that Congress intended to permit the suit." Clarke v. Securities Industries Ass'n, 479 U.S. 388, 399 (1987).

Here, the court of appeals agreed with the district court's conclusion that banks "were not intended beneficiaries of [the Federal Credit Union Act]." (Pet. App. 16a). It found that, in enacting the law, Congress was not "concerned about the competitive position of banks." (Pet. App. 22a).

> Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained. (Pet App. 21a).

These findings should have been the end of the inquiry and should have led to a determination that the banks lack standing under the zone of interests test.

The D.C. Circuit, however, did not dismiss but applied a second test of its own devise -- the "suitable challenger" doctrine -- to determine if banks nonetheless should be considered an appropriate litigant "to enforce a requirement designed to benefit the members -- particularly potential borrowers -- of credit unions." (Pet. App. 22a). Prior decisions of the court of appeals had construed this Court's competitor standing cases as permitting a party to be deemed within the zone of interests if its concerns are "sufficiently congruent with those of the intended beneficiaries of the statute" or show a "systematic alignment of interests with the statute's beneficiaries." (Pet App. 26a). Applying that rule to this case, the court concluded that the banks did have standing to enforce the common bond requirement, because:

> [t]here is . . . a reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself represents a congressional judgment that the constraint on competition is the means to secure the

economic end. (Pet. App. 28a)(emphasis added).

The court's conclusion that the banks satisfy prudential standing requirements under the "suitable challenger" doctrine is erroneous for several reasons.

A. The "suitable challenger" test is essentially contentless. It simply provides a phrase for articulating a conclusion that a party should have prudential standing, rather than providing objective criteria that courts may use to make reasoned and consistent decisions as to whether a party should have standing. The lack of judicially manageable criteria is demonstrated by the D.C. Circuit's own application of the suitable challenger doctrine. In the first case in which it applied this doctrine, the court stated that to accept the characterization of a law as an "'entry-restricting' statute . . . as a basis for standing would eliminate the prudential standing requirement." Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 284 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Yet the court of appeals found prudential standing here on the precise basis that Section 1759 was an "entry-like restriction". (Pet. App. 28a).

B. The "suitable challenger" doctrine fundamentally transforms the nature of the zone of interests inquiry from a determination of Congressional intent into an examination of the practical effects of granting standing to a particular party. The doctrine is phrased in terms of whether a party's interests are "congruent with those of intended beneficiaries" (Pet. App. 21a, 23a), so that the resulting pattern of litigation is likely to resemble closely the litigation that presumably would have been filed by the entities Congress actually intended to protect. Under these circumstances, the D.C. Circuit finds prudential standing "even if

the plaintiff's interest is not precisely the one that Congress sought to protect". (Pet. App. 24a). However, this Court's cases provide no justification for a results-oriented test that bases a determination of prudential standing on the likely effects of giving a particular party an opportunity to litigate.

C. The "suitable challenger" doctrine is subject to arbitrary application, depending upon how the "interests" ostensibly involved are articulated. The competitor standing cases on which the court of appeals relied involved statutory lines of demarcation, which arguably prevented one type of company from offering a specific product to customers.[2/] The court of appeals mischaracterized Section 1759 as involving an entry restriction, when it actually operates in a fundamentally different fashion.

Section 1759 does not impose an "entry-like restriction." There is no dispute that each of the persons covered by a multiple employer group is already eligible to receive credit union services, either from an existing institution or from a credit union that could be newly organized. The only issue before NCUA is which credit union, out of the universe of those potentially eligible to serve those persons, ought to have the ability to attract them as members, factoring in safety and soundness considerations. This situation is thus fundamentally different from the competitor standing cases relied on by the court of appeals, in which a competitor patrolled

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2/ E.g., Clarke v. Securities Indus. Ass'n, supra (challenge to agency decision to permit banks to offer discount securities services to customers); Investment Co. Institute v. Camp, 401 U.S. 617 (1971)(may national banks offer collective investment services to their customers?); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970)(may national banks offer data processing services to their customers?).

an entry-restricting "picket line" -- that is, a statutory barrier that prevented any member of one class of financial institution from offering a specific service to customers.

This analysis of the court's "entry-restricting" rationale suggests two conclusions. First, the determination whether an entity is a "suitable challenger" is subject to materially different outcomes, depending upon how the reviewing court chooses to characterize the effects its lawsuit may have. Second, on its own reasoning here, the D.C. Circuit misunderstood the statutory scheme and mischaracterized the effects of allowing banks to litigate on behalf of the persons Congress actually intended to benefit -- existing and potential credit union members.

D. In sum, application of the fundamentally flawed "suitable challenger" doctrine has produced an anomalous result in this case. A statute intended to benefit workers, by facilitating their association in cooperative credit unions, has been invoked by financial institutions whose interests are inconsistent (indeed, hostile), with the result that workers' ability to associate freely and form safe and sound credit unions has been significantly restricted.

The D.C. Circuit has applied the "suitable challenger" doctrine to determine standing to challenge agency decisions under various federal statutes, notably the environmental laws. That court plays a leading role in determining federal administrative jurisprudence, and the principal cases in which this Court has applied the prudential zone of interests test involve claims under the Administrative Procedure Act. Clarke, 479 U.S. at 400 n.16. Accordingly, the recurring question of whether the "suitable challenger" test is consistent with this Court's prudential standing decisions would warrant review, even if it were not in conflict with the decision of another court of appeals.

In this case, Supreme Court review is especially appropriate because, as the Petitioners have demonstrated, there is an explicit conflict among the Circuits on the specific question whether banks satisfy the prudential standing requirement to challenge the NCUA's "common bond" provision. Branch Bank and Trust Co., 786 F.2d at 625-26.

II. THE COURT OF APPEALS MISAPPLIED CHEVRON AND MISINTERPRETED THE FEDERAL CREDIT UNION ACT

This case independently warrants review on the substantive question whether the D.C. Circuit misinterpreted Section 1759 and its common bond exception. Although there is no conflict among the Circuits on this issue, its significance for the future of the credit union industry warrants review at this time.[3/]

The court of appeals erred by failing to defer to the NCUA's longstanding construction of the meaning of the field of membership provision, as required by Chevron. The court found that the intent of Congress is clearly discernible from the statutory text and justified its contrary interpretation. (Pet. App. 6a). The court, however, did not find the meaning of Section 1759 in the language of the statute or the context in which it is used, but rather

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3/ See NationsBank of N.C., N.A. v. Variable Life Ins. Co., 115 S. Ct. 810, 813 (1995)(certiorari granted in the absence of a conflict, due to importance of the issue whether national banks may serve as agents in the sale of annuities). The "common bond" issue currently is pending decision before the Sixth Circuit, which previously decided that banks have prudential standing to sue. First City Bank v. NCUA, No. 95-6543 (argued October 15, 1996).

constructed its own interpretation from abstract logic. The court's reading does not take into account the full text of the statute and produces results fundamentally at odds with what Congress intended.

A. In concluding that the statute was unambiguous, the court relied heavily on the inclusion of the plural noun "groups" in the phrase "groups having a common bond" in the exception clause of Section 1759. The court found that this noun supported the conclusion that each and every member of the groups represented in a credit union must have the same, pre-existing common characteristic. (Pet. App. 6a-7a).

However, the court's selective use of a dictionary definition of "group" favorable to its interpretation, and disregard of a prior parallel definition that supports the NCUA's construction, shows the existence of an ambiguity which permits the agency to interpret the term in a manner consistent with either definition, and which requires the courts to defer to the agency's construction. National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992).[4/] The disagreement among the courts below about the proper interpretation of the term "groups" is itself prima facie evidence of an ambiguity in this statutory language. See Smiley v. Citibank (South Dakota) N.A., 116 S. Ct. 1730, 1732 (1996).

4/ The decision in MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994), is not applicable, because the dictionary definition that supports NCUA's conclusion is not an aberrant definition that contradicts the meaning "contained in virtually all other dictionaries." Id. at 2230.

B. On its face, the term "common bond" is inherently ambiguous. The phrase is not defined in the statute. Nor is it a term with a standard meaning in the financial services industry. Indeed, the court of appeals itself found that "[n]either syntactical argument" presented by the NCUA and by the banks "is convincing". (Pet. App. 6a). This finding, in itself, is persuasive evidence that there is an ambiguity in the statutory language.

C. In interpreting the "common bond" exception, the court failed to consider the principal clause of Section 1759 and to consider the language in this overall context. The first portion of that Section authorizes "incorporators and such other persons and incorporated and unincorporated organizations" to come together to form a federal credit union, subject to such rules as NCUA may prescribe.

Nothing in this language, authorizing previously-formed groups to coalesce together to form a credit union to promote thrift, suggests that Congress in 1934 intended to limit the right of free association and confine workers to engaging in cooperative self-help measures only with others employed by the same company or within the same industry. To the contrary, the full text supports NCUA's interpretation that various groups, each of which had previously organized along its own internal lines, could join together to establish a credit union.

The court also recognized but did not give effect to NCUA arguments that its longstanding interpretation was important to its ability to further its statutory obligations, namely to protect the safety and soundness of credit unions by permitting them "to realize economies of scale and to facilitate occupational diversification within the ranks of its membership." (Pet. App. 3a-4a). However, nothing in the language authorizing previously-

formed organizations to band together suggests that Congress intended to impose restrictions on the field of membership that would expose a credit union to a risk of failure, shared by no other type of federally insured financial institution, due to a mandatory intertwining of the health of the credit union and the business fortunes of a single employer or industry segment.

Congress also did not intend to deny most working Americans access to credit unions, or to condemn credit unions to a fate in which they are precluded from taking advantage of scale efficiencies, available to all other types of federally insured financial institutions, to offer cost-effective services to members. But as we demonstrate in the next Section, this is precisely the effect the court of appeals' decision will have.

In sum, there are substantial legal reasons to believe that the court of appeals' interpretation of Section 1759 is erroneous, based on consideration of the full text, and that it produces results opposite to those Congress intended in enacting this provision.

III. THE COURT OF APPEALS' DECISION WILL SUBSTANTIALLY HARM ALL FEDERAL CREDIT UNIONS AND THEIR MEMBERS

The decision of the court of appeals has severe and immediate detrimental effects on consumers and existing multiple occupational credit unions. These adverse effects are so profound as to adversely affect the safety and soundness of the entire credit union sector of the financial services industry.

A. Adverse Effects on Consumers.

Congress authorized creation of federal credit unions during the Depression, to provide less affluent Americans access to credit they either could not obtain or could not obtain at reasonable rates. (Pet. App. 16a-17a, 38a). Unable to obtain credit from banks, many working people were forced to turn to loan sharks or other institutions that charged excessive interest rates. Congress envisioned federal credit unions as a means of allowing persons unserved or poorly served by the banking system to associate together in self-governing organizations to engage in cooperative economic self-help efforts. (Id.).

Federal credit unions continue to play this vital role in today's economy. They offer consumers whose incomes span a broad spectrum access to credit and other financial services on reasonable terms. Further, many small businesses offer access to credit unions as a significant element in their employee benefits package. Workers with incomes too low to afford bank services thereby may obtain access to credit without having to resort to higher cost alternatives, such as finance companies, check cashing operations, and pawn brokers.

The court of appeals' decision may deprive millions of Americans access to affordable credit union services. Employees of small businesses will be especially harmed. Under the court's interpretation of the "common bond" requirement, many employers will be too small for their workers to support a viable credit union. NCUA has concluded that, for safety and soundness reasons, a federal credit union must have at least 500 potential members in order to be viable. (Pet. App. 4a). According to the Small Business Administration, however, in 1994 more than 62%

of all American jobs are provided by companies with fewer than 500 employees.

One of NCUA's principal purposes in adopting its multiple employer policy was to diversify risk; another was to allow groups of workers that were too small to support a viable credit union to band together to promote cooperative thrift. (Pet. at 6-7) In essence, the decision below denies the right of cooperative financial association to the vast proportion of working Americans, and to the very persons Congress found have the greatest need for access to credit union services.

Statistics submitted by NCUA to the district court suggest that in excess of 1100 people per day are now being denied access to membership in multi-employer credit unions affected by the court of appeals' decision. Further, if the district court orders dismemberment of these institutions into their constituent employee groups, millions of workers will have to withdraw their accounts and seek credit elsewhere. Thus, the decision threatens to return many low income workers to a status in which they are denied access to credit by the high fees and minimum balance requirements imposed by banks, and are forced to fall back on loan companies, loan sharks, pawn shops and check cashing stores that prey on underserved consumers.

B. Adverse Effects on Federal Credit Unions.

As NCUA demonstrates (Pet. 3, 15), the court of appeals' decision will have an adverse effect on approximately 3600 credit unions, which have relied on the multiple occupational group policy since 1982 to add some 158,000 employer groups to their membership. These institutions serve 32 million people, who hold $132 billion in shares and $94 billion in loans.

1. Financial Harm. Some of the adverse financial effects on members have already begun to occur. Multiple employer credit unions can no longer add new members from outside their core group to replace shareholders who die, retire or relocate. In addition, these credit unions made enormous investments of their members' money in the physical plant, computer systems and personnel necessary to service the new members added under the NCUA's policy. The NCUA estimates that over 200 multiple group credit unions will suffer financial losses within six months under the decision below. (Id.). Further, in a dismemberment scenario, these credit unions stand to lose a significant portion of their investments in personnel and capital assets. They also face the prospect of additional losses from the liquidation of substantial portions of their asset portfolios, which will be necessary to finance the share outflows.

The long-term effects of the court's decision may be equally devastating to the financial health of credit unions. As the court of appeals recognized (Pet. App. 4a), another explicit purpose of NCUA's adoption of the multiple employer policy was to permit "occupational diversification within the ranks of membership." During the recession of 1981-83, major industrial dislocations and plant closings occurred, especially in Midwestern States. Single employer credit unions were hit hard on both the share and loan sides of their balance sheets, because the financial circumstances of many members were adversely affected at the same moment due to a reversal in the fortunes of their common employer.

Diversification of risk is an elementary principle of financial management. NCUA responded to evidence of the financial risk inherent in single employer institutions by allowing credit unions to broaden and diversify their membership base, so

that they would not be dependent upon the fortunes of one employer or one industry. (Pet. at 6). The policy remains important today, in helping credit unions weather such events as corporate downsizings, restructuring of industries, and military base closings.

For example, if a credit union were restricted to the employees of one airline, the institution would face severe economic difficulties, through no fault of its own, if the airline were forced to close due to competitive losses. Similarly, if a company divided itself into parts, an employee credit union could suffer significant losses if forced to divide into component pieces, each of which would have to purchase separately assets formerly used by all members.

In sum, the court of appeals has reversed the longstanding NCUA-sanctioned movement toward diversification and in its place introduced a systemic risk into the federal credit union system. This risk is faced by no other type of federally insured financial institution. This result contradicts the Congressional intention to promote viable, cooperative financial institutions.

2. Commercial Harm. The decision below also will have significant adverse effects on the ability of credit unions to continue offering a broad range of cost-effective services to their members.

As the court of appeals recognized (Pet. App. 3a), the NCUA multiple group policy was intended to allow federal credit unions to "realize economies of scale." Experience has shown that substantial operating and financial efficiencies are available to insured financial institutions. Indeed, these scale economies are essential to allowing a credit union to offer services to members in a cost-effective manner. For example, the costs of originating and

servicing loans do not increase in proportion to the amount of the loans. Credit unions also are information intensive entities, in which the costs attributable to the generation, collection and management of information are high. There are significant scale economies associated with information handling -- that is, in computing and communicating.

By restricting occupational credit unions to a narrow field of membership, the court of appeals' decision threatens to deny these credit unions, alone out of all types of insured financial institutions, access to the scale efficiencies that are necessary to compete effectively in the market.

C. Adverse Effects on the Insurance Fund.

The ability of federal credit unions to diversify their membership and to take advantage of scale economies is critical to maintaining their safety and soundness. By restricting the field of membership, the court of appeals has adversely affected the financial strength of these institutions and increased the risk that some may fail in any economic downturn. The court thereby has increased the likelihood that demands will be placed on the federal insurance fund that insures deposits in credit unions, a burden that will be felt by the entire credit union industry.

Shares in federal credit unions are insured up to $100,000 by the National Credit Union Share Insurance Fund. 12 U.S.C. § 1783(a). Upon the insolvency of an insured credit union, the NCUA is authorized to liquidate its assets and draw upon the NCUSIF in amounts necessary to pay off all insured shares. 12 U.S.C. § 1787. The NCUSIF has not experienced a loss in nearly three years, because credit unions have been in good financial condition due to policies like the multiple employer rule, which

has allowed NCUA to create strong and diversely based credit unions.

By imposing additional risks on individual credit unions, the court's ruling increases the chances of a drain upon the NCUSIF, which is the ultimate support system for the credit union community. These risks include the heightened vulnerability from lack of diversity in membership; inability to enjoy scale economies and compete efficiently; and the prospect of capital losses from forced divestiture of physical plant and assets.

The risks of loss would be particularly great for small employee groups that would have to be spun off in dismantling multiple employer credit unions. Small groups may not be able to form a new credit union, consistent with NCUA safety and soundness guidelines, or to operate in a cost-effective manner. See Interpretive Ruling and Policy Statement 89-1, 54 Fed. Reg. 31165, 31171 (July 27, 1989). In such cases, the loans and assets of these groups would have to be sold. NAFCU's internal research concludes that 3000 existing multiple employer credit unions, representing 42% of all federal credit unions, may experience some level of loss upon dismemberment. There is a significant risk that some portion of these losses will have to be absorbed directly by the NCUSIF, to the detriment of all insured institutions.

CONCLUSION

For the reasons set forth above, the Petitions for a writ of certiorari should be granted.

Respectfully submitted

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v.

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Respondents.

AT&T FAMILY FEDERAL CREDIT UNION
and CREDIT UNION NATIONAL ASSOCIATION,
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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE FOR THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE FOR THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF THE PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Consumer Federation of America ("CFA"), a non-profit association of approximately 240 local, state, and national consumer groups, is the Nation's largest consumer advocacy group, representing

more than 50 million Americans.[1] CFA was founded in 1968 to advance the consumer interest through advocacy and education, and to represent the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts. CFA gathers facts, analyzes issues, and disseminates information to the public, Congress and federal agencies to provide a voice for the concerns of consumers, particularly those of limited means who are least able to speak for themselves. CFA represents American consumers on a variety of issues that significantly affect their daily lives, such as financial services, product safety, health care and victim's rights. CFA has often appeared before this Court, either as an *amicus* or as a party, to advance the interests of consumers in cases affecting those interests.[2]

CFA and the consumers it represents have a strong interest in this case. It is the official policy of CFA to support the continued existence of a strong, independent, consumer owned and controlled credit union system. CFA opposes any legislative or regulatory efforts that would hinder credit unions' provision of financial services, particularly to moderate and low income Americans. CFA believes that the lower court's decisions in this case, if allowed to stand, will have devastating consequences for the entire credit union

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[1] This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

[2] Cases before this Court in which CFA has participated include *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, No. 95-922; *Smiley* v. *Citibank (South Dakota), N.A.*, No. 95-860; *Medtronic, Inc.* v. *Lohr*, Nos. 95-754 and 95-886; *United States of America* v. *The Chesapeake and Potomac Telephone Company of Virginia*, Nos. 94-1893 and 94-1900; *Turner Broadcasting System, Inc.* v. *Federal Communications Commission*, No. 93-44; *TXO Production Corp.* v. *Alliance Resources Corp.*, No. 92-479; *Arcadia, Ohio* v. *Ohio Power Company*, No. 89-1283 and *Browning-Ferris Industries of Vermont* v. *Kelco Disposal, Inc.*, No. 88-556.

system and for the millions of consumers—many of whom are of low or moderate income—who rely on the services of credit unions to meet their financial needs.

SUMMARY OF ARGUMENT

This Court should grant certiorari to review the court of appeals' erroneous invalidation of the National Credit Union Administration's longstanding interpretation of the common bond provision of 12 U.S.C. § 1759. By improperly substituting its own judgment on this matter for that of the expert agency, the court of appeals reached a decision that threatens to deprive millions of low and moderate income consumers of access to needed financial services. Under the agency's interpretation, federal credit unions have been able to achieve financial stability by diversifying their memberships to include multiple employer groups, each with its own common bond. This has enabled credit unions to serve millions of new members and to do so with fees and rates that are much more favorable than those offered by banks. Under the court of appeals' ruling, however, the federal credit union system would literally be dismembered, and many low and moderate income individuals would be deprived of access to financial services entirely or be forced to rely on fringe banking services. And millions of others would pay substantially higher charges for such services and earn substantially lower rates of interest. Such a devastating ruling to consumers warrants this Court's review.

In addition, CFA urges the Court to resolve the conflict in the circuits over whether banks have standing to enforce the common bond provision. Both the legislative history and the court of appeals' decision itself make clear that this provision was enacted to benefit consumer interests. Yet the court of appeals permitted the respondent banks—whose competitive interests in debilitating credit unions are diametrically

opposed to the consumer interests that Congress intended to protect—to prosecute a case that, if successful, would harm credit union customers throughout the Nation. The Fourth Circuit, when presented with the identical issue, ruled that competitor banks do not have standing to enforce this consumer protection legislation. Only this Court can resolve that conflict.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW IN LIGHT OF THE IMPORTANCE OF THIS CASE TO THE ENTIRE CREDIT UNION SYSTEM AND THE MILLIONS OF CONSUMERS WHO RELY ON IT

CFA urges the Court to grant certiorari to review the D.C. Circuit's invalidation of a fourteen-year-old regulation of the National Credit Union Administration ("NCUA")[3] that allowed credit unions to ensure their financial stability by expanding membership to include multiple employee groups, provided that the individuals comprising each group share a "common bond."

CFA believes that the court below erred both in ruling that competitors of credit unions have standing to challenge NCUA's purported misapplication of the "common bond" provision of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759, as well as in failing to defer to NCUA's reasonable interpretation of that provision. But CFA also wishes to apprise the Court of the significance of this case for the millions of consumers—particularly those of moderate or low income—who rely on credit unions. Because credit unions are owned and controlled by their individual members, they

[3] *See* Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982); IRPS 82-3, 47 Fed. Reg. 26,808 (1982); IRPS 89-1, 54 Fed. Reg. 31,168 (1989); IRPS 94-1, 59 Fed. Reg. 29,066 (1994), *as amended by* IRPS 96-1, 61 Fed. Reg. 11,721 (1996); *see also* 12 C.F.R. § 701.1 (1996).

are able to provide financial services on far more attractive terms than banks will offer, and to provide those services to some consumers that banks have shunned. The FCUA, as it has been interpreted by NCUA for the last fourteen years, has thus resulted in an enormous financial benefit to consumers—precisely the result envisioned by Congress when it enacted the statute. By contrast, the decision below, if allowed to stand, would entirely deprive some consumers of needed services, would cause consumers prevented from joining credit unions to incur substantially higher fees and charges assessed by banks, and would result in higher fees assessed against all bank customers.

CFA agrees with NCUA and with intervenor/petitioners AT&T Family Federal Credit Union and Credit Union National Association ("CUNA") that NCUA's policy was a reasonable interpretation of the common bond provision, which provides in pertinent part that "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association * * *." 12 U.S.C. § 1759. The court of appeals held that this provision was unambiguous and therefore that NCUA's interpretation was entitled to no deference whatsoever under the standards set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Yet NCUA's interpretation—that membership in a federal credit union may consist of multiple groups, each of which possesses its own common bond—is certainly a reasonable interpretation of ambiguous statutory language.

Indeed, the court of appeals' own interpretation of the text and purpose of the statute demonstrates its ambiguity. According to the court, the purpose of the common bond provision was to ensure that each credit union would be "a cohesive association in which the members are known by the officers and each other * * *." NCUA Pet. App. at 11a. Yet under the court's interpretation,

employees of two companies could become members of the same credit union where one company has bought another company, which remains a separate subsidiary. *Id.* at 8a. Even if the employees of the two companies are separate and apart from each other and even if they are located at opposite ends of the country, the joint ownership, in the court of appeals' view, satisfies the common bond provision. But such a tenuous union hardly promotes "a cohesive association in which the members are known by the officers and each other." Under NCUA's interpretation, by contrast, the statutory purpose is satisfied so long as the members of each separate group within a credit union share a common bond. This flaw in the court's reasoning further shows that Congress' intent is not clearly discernible and therefore that the statute is ambiguous.

Accordingly, the court of appeals erred in failing to defer to NCUA's interpretation and in substituting its own policy judgments for those of the expert agency entrusted to make such judgments. Given the importance of this issue for consumers throughout the Nation, this Court should not allow the court of appeals' ruling to stand without further review. Credit unions are of vital importance to millions of people who rely on them to provide the entire range of individual financial services.[4] Many low income consumers are precluded from using banking services due to the high minimum balances, high fees, and stringent credit requirements imposed by banks. Credit unions, by contrast, offer much lower fees and more attractive credit terms than do banks.

[4] Much of the information summarized below is set forth in the affidavit of Stephen Brobeck, CFA's Executive Director, filed in opposition to the plaintiffs' motion for injunctive relief in a related case, *First National Bank & Trust Co.* v. *National Credit Union Administration*, Nos. 96-5347 *et al.* (D.D.C. filed Oct. 7, 1996). Respondents filed that action after the court of appeals' decision in the present case, in an attempt to impose the decision in this case retroactively on a nationwide basis.

A recent study conducted by CFA and CUNA shows the degree to which consumers benefit from access to credit union services.[5] That study found the following:

- only a small minority of credit unions, but a large majority of banks, charge fees on economy checking accounts
- fees charged by credit unions for regular checking accounts are, on average, 40% lower than those charged by banks
- on interest-bearing checking accounts, fewer than half of credit unions, but all banks, charge monthly fees when minimum balances are not met, and credit union fees are, on average, 40% lower than bank fees
- significantly fewer credit unions than banks (69% versus 93%) charge for overdrafts, and credit union charges are, on average, 40% lower than bank charges
- significantly fewer credit unions than banks (25% versus 48%) charge an annual credit card fee, and credit union fees are, on average, more than 25% lower than bank fees

These fees are no small matter, particularly to consumers of modest means: total bank fees on deposit accounts exceed $16 billion annually. *See* Federal Deposit Insurance Corporation, *Statistics of Banking* at B-45 (1995).

[5] The data on bank fees was collected by Sheshunoff Information Services by sending a survey to all banks and savings and loans in the summer of 1995. The data on credit union fees was collected through a survey undertaken by CUNA in the fall of 1995 and based on a random sample of 2000 credit unions.

Similar disparities exist between interest rates charged and dividends and interest paid by credit unions and banks. A study undertaken by CFA and CUNA for the period from December 1993 to April 1996 found that credit unions pay significantly higher rates on savings accounts than do banks, averaging about a full percentage point higher for money market and interest-bearing checking accounts, and about two-thirds of a point for certificates of deposit.[6] Likewise, credit unions charge significantly lower rates for credit cards (by 5 percentage points), personal loans (by 1.5 to 2 points), and automobile loans (by 1 to 1.5 points). This study estimated that if all savers were able to shift their savings from banks to credit unions, they would earn about $8 billion more in dividends, and if all borrowers were able to shift their credit card balances from banks to credit unions they would save an additional $8 billion in interest.

As can be seen, credit unions provide enormous benefits for consumers, particularly those with low incomes who are unable to pay the substantially higher fees and interest rates charged by banks. That is precisely what Congress intended when it enacted the FCUA in the wake of the Great Depression. That statute was enacted to "make available to people of small means credit for provident purposes" and to "bring normal-credit resources on a cooperative basis to the masses of the people whose buying power is now so often dissipated in high-rate interest charges." S. Rep. No. 555, 73d Cong., 2d Sess. 1, 3 (1934). Credit unions were intended as a "happy medium" between banks, which often would not lend small amounts of money to low and moderate income individuals, and "loan sharks," who would do so only at usurious rates. *See* 78 Cong. Rec. 7259, 12,224 (1934).

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[6] This study was based on data collected by Bank Rate Monitor.

The decision below threatens to curtail substantially the enormous consumer benefits provided by credit unions. At a minimum, it would appear that under the court of appeals' ruling, credit unions would be unable to diversify their membership beyond the groups for which they have already received regulatory approvals, thereby preventing them from serving additional members and from achieving the financial stability resulting from this diversification. And if that ruling is accorded full retroactive effect, as respondents have urged in their new lawsuit (*see supra* n. 4), credit unions would be prohibited from accepting any new members outside of their "core" occupational groups, and might even be required to divest new groups added since NCUA's multiple group policy was adopted in 1982. More than 32 million individuals have joined credit unions under that policy.

These results would be disastrous for low and moderate income consumers. The fee structure adopted by many banks creates a significant barrier to millions of individuals who, if prevented from utilizing credit union services, may be deprived of access to financial services entirely or be forced to rely on check-cashing and other fringe banking services. Similarly, many borrowers are not able to obtain credit from banks because they do not have established credit or require small loans. Credit unions, however, are willing to extend credit to those who do not satisfy every requirement of standard underwriting criteria,[7] and, as noted above, credit unions charge significantly lower interest rates than do banks. Many credit unions also provide credit counseling to their members, and have created products specifically designed for low and moderate income members, such

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[7] *See* National Credit Union Administration, *Letter to Credit Unions No. 174* (August, 1995) (outlining risk-based lending procedures under which credit unions have been able to "reach out to the underserved").

as low dollar credit cards and small loans to cover such items as utility deposits. Moreover, the evisceration of credit unions that would result from the decision below will also affect consumers who are not credit union members. Credit unions are significant competitors to banks, particularly in certain sectors. For example, credit unions are the Nation's second largest providers of automobile loans, with 22.3% of that market. *See* Callahan & Associates, *1997 Credit Union Directory* at 6 (1996). Thus, if competition from credit unions is substantially curtailed, it is reasonable to assume that bank fees and charges will tend to rise even further as a result.

CFA believes that the benefits provided by credit unions to low and moderate income consumers are the result of the financial stability enabled by NCUA's multiple group policy, and the credit union's cooperative structure, which vests ownership and control with the members themselves.[8] Under the court of appeals' ruling, these benefits would be severely reduced through the literal dismemberment of the federal credit union system. A decision of such wide-ranging importance to consumers plainly warrants this Court's review.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT IN THE CIRCUITS OVER WHETHER COMPETITORS OF CREDIT UNIONS HAVE STANDING TO ENFORCE A LAW INTENDED TO BENEFIT CONSUMERS

Certiorari is also warranted to review the court of appeals' ruling conferring standing on the respondent

[8] *See* 12 U.S.C. § 1757(6) (credit unions are funded by shares purchased by members); *id.* § 1757(5) (credit unions may make loans only to their own members, other credit unions, or credit union organizations); *id.* § 1760 (members control credit unions, with each member having one vote); *id.* § 1761 (credit unions are managed by boards of directors and supervisory committees consisting of credit union members, almost all of whom are volunteers).

banks to challenge NCUA's purported misinterpretation of the common bond provision. In that decision—which is directly contrary to the decision of the Fourth Circuit in *Branch Bank and Trust Co.* v. *National Credit Union Administration Board*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)—the D.C. Circuit held that banks fall within the "zone of interests" protected by the common bond provision, even though it is undisputed that the competitive interests of banks are squarely opposed to the consumer interests that Congress intended to protect through the statute.

Congress clearly intended the common bond provision as a pro-consumer measure benefiting credit union members. As the court of appeals itself recognized in this case, Congress intended that the FCUA, by "guaranteeing democratic self-government[,] would infuse the credit union with a spirit of cooperative self-help and ensure that the credit union would remain responsive to its members' needs." NCUA Pet. App. at 2a-3a, 17a. Likewise, Congress "assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default * * *. The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." *Id.* at 3a, 21a-22a. *See Branch Bank*, 786 F.2d at 626 ("Consistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks.").

There is no question that the zone of interests test for standing under the Administrative Procedure Act "is not meant to be especially demanding," *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 399 (1987), but CFA does not believe that this Court's standing doctrine should be

expanded to allow such standing to competitor banks whose interests in disabling credit unions are diametrically opposed to the consumer interests Congress intended to protect.

In *Community First Bank* v. *National Credit Union Administration*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit, following the D.C. Circuit, rejected the Fourth Circuit's view and upheld the standing of banks to challenge NCUA's purported misinterpretation of the common bond provision. The Sixth Circuit, however, did so because it felt that "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion." *Id.* at 1054. According to that court, credit union members and other credit unions lacked incentives to sue and "consumer protection groups [do not] appear to be adequate substitutes for banks, who have sufficient adverse interests to challenge a questionable credit union expansion." *Id.* CFA, however, believes that credit union members and consumer protection groups like CFA and its constituents can, and will, take appropriate actions when consumer interests are threatened. The fact that no credit union member or consumer group has challenged NCUA's multiple group policy may simply be evidence that that policy serves the consumer interests that Congress intended to promote. The lack of any consumer-based challenge, therefore, should not be the legal predicate for allowing an action, like the present one, brought by competitor banks for the express purpose of severely curtailing the substantial consumer benefits provided by credit unions.

Accordingly, in light of the clear and irreconcilable conflict among the circuits on this issue, CFA urges the Court to grant certiorari to determine whether competitors of credit unions may bring suit to enforce the common bond provision of the FCUA.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petitions, the petitions should be granted and the judgment below reversed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

Nos. 96-843 and 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

CREDIT UNION NATIONAL ASSOCIATION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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96-843 Petition for Writ of Certiorari Filed: November 26, 1996; Certiorari Granted: February 24, 1997
96-847 Petition for Writ of Certiorari Filed: November 26, 1996; Certiorari Granted: February 24, 1997

82 pp

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UNITED STATES D.C. CIRCUIT
COURT OF APPEALS

Docket Nos. 91-5336 & 91-5262

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL.

v.

NATIONAL CREDIT UNTION ADMINISTRATION

DOCKET ENTRIES

DATE	PROCEEDINGS
1991	
Oct. 18	Copy of notice of appeal and docket entries from Clerk, USDC (n-4)
1992	
Jan. 8	Clerk's order granting motion to consolidate cases 91-5262 and 91-5336
1993	
Apr. 2	Opinion for the Court filed by Circuit Judge Silberman. Circuit Judge Wald, concurring

DATE	PROCEEDINGS
Apr. 2	Judgment for the Court that the judgment of the district court is hereby reversed and remanded, in accordance with the opinion for the Court filed herein this date
Apr. 2	Mandate delayed
June 10	Per Curiam Order that the motion to stay mandate is granted and the Clerk us directed to withhold issuance of the mandate through 6/23/93. Before: Wald, Silberman and D.H. Ginsburg, Circuit Judges
24	Notice from Supreme Court informing this court of cert. filing S.Ct. 92-2010 [1]
Oct. 12	Order from the Supreme Court denying cert. [1]
Dec. 1	Mandate Issued

UNITED STATES D.C. CIRCUIT
COURT OF APPEALS

Docket No. 94-5295

FIRST NATIONAL BANK AND TRUST COMPANY, ET AL.

v.

NATIONAL CREDIT UNTION ADMINISTRATION

DOCKET ENTRIES

DATE	PROCEEDINGS
1994	
Sept. 30	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant First Natl Bnk Trst, Lxngton St Bnk, Randolph Bnk Trst Co, Bnkr Trst NC, Amer Bnkr Assn. [75504-1] (jth)
1995	
Sept. 11	MOTION filed (5 copies) by Appellants (certificate of service dated 9/11/95) to supplement the record. [148869-1]. (lej)

DATE	PROCEEDINGS
25	PER CURIAM ORDER filed denying motion to supplement record for limited purpose [148869-1] filed by First Natl Bnk Trst, Lxngton St Bnk, Randolph Bnk Trst Co, Bnkr Trst NC, Amer Bnkr Assn. (cwc)
1996	
July 30	JUDGMENT for the reasons in the accompanying opinion reversing [214442-1] and remanding case to the USDC. [214442-2] Before Judges Buckley, Ginsburg, Tatel. (edb)
30	OPINION (12 pgs) for the Court filed by Judge Ginsburg. (edb)
30	CLERK'S ORDER filed that the Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. (edb)
Aug. 14	MOTION filed (5 copies) by Appellants First Natl Bnk Trst, Lexington St Bnk, Randolph Bnk Trst Co, Bnkr Trst NC, Amer Bnkr Assn (certificate of service dated 8/14/96) for immediate prospective relief implementing the Court's order or, [217703-1], in the alternative, for

DATE	PROCEEDINGS
	immediate isuance of the mandate. (lvs)
16	PER CURIAM ORDER filed granting appellant's motion for immediate prospective relief, or, in the alternative for immediate issuance of the mandate [217703-2]. The Clerk of the Court is directed immediately to issue the mandate in this action. [SEE THE ORDER FOR MORE COMPLETE DETAILS]. Before Circuit Judges: Buckley, Ginsburg, and Tatel. (jth)
16	MANDATE ISSUED to Clerk, District Court [217978-1]. (edb)
20	MOTION filed (5 copies) by Appellee Amer Tele Telegr Fam, Crdt Un Natl Assn (certificate of service dated 8/20/96) for reconsideration [218930-1], to recall the mandate. Response due on 8/30/96. (lvs)
20	MOTION filed (5 copies) by Appellee Natl Crdt Un Admin (certificate of service dated 8/20/96) for reconsideration of this Court's August 16, 1996 order granting appellants' motion for immediate issuance of the mandate [218979-1]. (lvs)

DATE	PROCEEDINGS
Sept. 9	PER CURIAM ORDER filed denying appellees' motions for reconsideration [218979-1] [218930-1] and the motion to recall the mandate [218930-2]. Before Circuit Judges: Ginsburg, and Tatel, and Sr. Circuit Judge Buckley. (jth)
13	PETITION for rehearing [223596-1] and SUGGESTION, for rehearing in banc [223596-2], (19 copies) filed by Appellee Natl Crdt Un Admin (c/s dated 9/13/96). (lvs)
16	PETITION for rehearing [224305-1] and SUGGESTION, for rehearing in banc [224305-2] (19 copies) filed by Appellees Amer Tele Telegr Fam, Crdt Un Natl Assn (c/s dated 9/13/96). (lvs)
Oct. 4	OPPOSITION filed [228015-1] (20 copies) by Appellant's The First National Bank and Trust Company, et al., (certificate of service dated 10/4/96) to the petitions for rehearing/suggestions for rehearing In Banc. (jth)

DATE	PROCEEDINGS
23	PER CURIAM ORDER filed denying the petitions for rehearing [223596-1] [224305-1],. Before Circuit Judges Ginsburg, Tatel, and Buckley, Senior Circuit Judge. (lvs)
23	PER CURIAM ORDER, In Banc, filed denying the suggestions for rehearing in banc [224305-2] [223596-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. *Circuit Judge Henderson did not participate in this order. (lvs)
Nov. 29	NOTICE filed by the Clerk of the Supreme Court, advising that a petition for Writ of Certiorari was filed 11/26/96, Supreme Court Docket No. 96-843. (Petitioner appears to be the Natl Credit Union Admin) [241534-1]. (jth)
Dec. 4	NOTICE filed by Clerk, Supreme Court, advising of the filing on 12/02/96 of a Petition for Writ of Certiorari. Supreme Court Docket No. 96-847. (Petitioner appears to be AT&T Family Federal Credit Union, et al.) [241535-1]. (jth)

DATE	PROCEEDINGS
1997	
Feb. 25	NOTICE filed by Clerk, Supreme Court advising that on 02/24/97 the Petition for Writ of Certiorari, No. 96-843, Petitioner Nat'l Credit Union Admin, et al., was granted. [259242-1]. (jth)
25	NOTICE filed by Clerk, Supreme Court, advising that on 02/24/97 the Petition for Writ of Certiorari, No. 96-847, Petitioner AT&T Family Federal Credit Union, was granted. [259243-1]. (jth)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. 90-CV-2948

FIRST NATIONAL BANK & TRUST CO., ET AL.

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL.

DOCKET ENTRIES

DATE		PROCEEDINGS
1990		
Dec. 4	(1)	COMPLAINT filed; Exhibit (1); (1) summons issued (dot) [Entry date 12/05/90]
1991		
Jan. 23	(3)	AMENDED COMPLAINT by plaintiff adding 1ST NATL. BNK & TRST amending complaint [1-1]; Exhibit (1) (ker) [Entry date 01/25/91]
Feb. 5	(4)	MOTION by plaintiff's for summary judgment; Affidavit (7), Exhibit (39) (ker) [Entry date 02/0[illegible]/91]

DATE		PROCEEDINGS
6	(5)	MOTION by defendant NATL. CREDIT UNION to dismiss amended complaint (mf) [Entry date 02/07/91]
		* * * * *
20	(9)	MEMORANDUM by plaintiffs in opposition to motion to dismiss amended complaint [5-1] by NATL. CREDIT UNION (kk) [Entry date 02/25/91]
		* * * * *
Mar. 4	(12)	SUPPLEMENTAL MEMORANDUM by plaintiffs in opposition to motion to dismiss amended complaint [5-1] by NATL. CREDIT UNION. Attachment (ajr) [Entry date 03/11/91]
7	(13)	REPLY by defendant NATL. CREDIT UNION to response to motion to dismiss amended complaint [5-1] by NATL. CREDIT UNION; Attachment (1) (ks) [Entry date 03/12/91]

DATE		PROCEEDINGS
7	(14)	MOTION by movant AT&T FAMILY FEDERAL, movant CREDIT UNION NAT'L to intervene as defendants; Affidavits (2); EXHIBITS (ANSWERS (2)) (ks) [Entry date 03/12/91]
		* * * * *
Apr. 25	(23)	ORDER by Judge Stanley S. Harris: granting motion to intervene as defendants [14-1] by CREDIT UNION NAT'L, AT&T FAMILY FEDERAL (N) (mbh) [Entry date 05/03/91]
		* * * * *
25	(25)	ANSWER for intervenor-defendant AT&T FAMILY FEDERAL, (mbh) [Entry date 05/03/91]
25	(26)	ANSWER for intervenor-defendant CREDIT UNION NAT'L (mbh) [Entry date 05/03/91]
Aug. 9	(36)	OPINION by Judge Stanley S. Harris (N) (emh)
9	(37)	ORDER by Judge Stanley S. Harris: granting motion to dismiss amended complaint [5-1] by NATL. CREDIT UNION (N) (emh)

DATE		PROCEEDINGS
	23 (38)	NOTICE OF APPEAL by plaintiff 1ST NATL. BNK & TRST, plaintiff AMER. BANKERS ASSN., plaintiff BANKERS TRUST/NC, plaintiff RANDOLPH BANK/TRUST, plaintiff PIEDMONT STATE BANK from order [37-1] entered 8/9/91. $5.00 filing fee and $100.00 docketing fee paid. Copies mailed to Vaughan Finn, Theodore C. Hirt and Paul Joseph Lambert. (mbh) [Entry date 08/26/91]
Oct. 7	(39)	NOTICE OF APPEAL by plaintiff LEXINGTON STATE BANK from order [37-1] entered 8/9/91. $5.00 filing fee and $100.00 docketing fee paid. Copies mailed to Vaughan Finn and Paul Joseph Lambert. (mbh)
		* * * * *
1993		
Dec. 2	(41)	CERTIFIED COPY of Judgment filed in USCA dated 4/2/93, on appeal [39-1], appeal [38-1], reversing the judgment of USDC, remanding cases for further proceedings; Opinion. USCA # 91-5262, 91-5336 (mbd) [Entry date 12/06/93]
		* * * * *

DATE		PROCEEDINGS
	16 (45)	MOTION (renewed) filed by plaintiff(s) for summary judgment; exhibits (25) (dot) [Entry date 12/17/93]
		* * * * *
1994		
Feb. 4	(53)	MOTION filed by defendant NATL. CREDIT UNION for summary judgment, Exhibits (34), bulky pleading (lpp) [Entry date 02/07/94]
	4 (54)	CROSS MOTIONS by intervenor-defendant CREDIT UNION NAT'L, intervenor-defendant AT&T FAMILY FEDERAL for summary judgment Exhibit: (27), bulky pleading (lpp) [Entry date 02/07/94]
	18 (55)	RESPONSE by plaintiff(s) in opposition to motion for summary judgment [53-1] by NATL. CREDIT UNION. (lpp) [Entry date 02/23/94]
	18 (56)	REPLY by plaintiff(s) to response to motion for summary judgment [45-1] by plaintiff(s) (lpp) [Entry date 02/23/94]
Mar. 1	(57)	REPLY by defendant NATL. CREDIT UNION to response to motion for summary judgment [53-1]

DATE		PROCEEDINGS
		by NATL. CREDIT UNION (lpp) [Entry date 03/03/94]
1	(58)	REPLY by intervenor-defendant CREDIT UNION NAT'L, intervenor-defendant AT&T FAMILY FEDERAL to response to cross motion for summary judgment [54-1] by AT&T FAMILY FEDERAL, CREDIT UNION NAT'L (lpp) [Entry date 03/03/94]
		* * * * *
Sept. 15	(70)	MEMORANDUM OPINION by Judge John H. Pratt (N) (bjl) [Entry date 09/19/94]
15	(71)	ORDER by Judge John H. Pratt: granting cross motion for summary judgment [54-1] by AT&T FAMILY FEDERAL, CREDIT UNION NAT'L, granting motion for summary judgment [53-1] by NATL. CREDIT UNION, denying motion for summary judgment [45-1] by plaintiff; dismissing complaint with prejudice.[1-1] (N) (bjl) [Entry date 09/19/94]

DATE		PROCEEDINGS
23	(72)	NOTICE OF APPEAL by plaintiff(s) 1ST NATL. BNK & TRST, plaintiff(s) AMER. BANKERS ASSN., plaintiff(s) BANKERS TRUST/NC, plaintiff(s) RANDOLPH BANK/TRUST, plaintiff(s) LEXINGTON STATE BANK, plaintiff(s) PIEDMONT STATE BANK from order dismissing complaint with prejudice.[1-1] [71-1], order [71-2], entered on: 9/19/94, no fees paid, Copies to: A. Douglas Melamed, John J. Gill, Anne L. Weismann, Kenneth L. Doroshow, John Ianno, Paul J. Lambert. (lpp) [Entry date 09/26/94] [Edit date 09/26/94]
		* * * * *
1996		
Aug. 19	(73)	CERTIFIED COPY of judgment filed in USCA dated 7/30/96, on appeal [72-1], reversing the judgment of USDC, and remanding for further proceedings. USCA # 94-5295 (cjp) [Entry date 08/25/96]

DATE		PROCEEDINGS
23	(74)	MOTION filed by plaintiffs for immediate enforcement of the mandate; exhibits (7) (dam) [Entry date 08/27/96]
		* * * * *
9	(82)	MOTION filed by intervenor-defendant CREDIT UNION NAT'L, intervenor-defendant AT&T FAMILY FEDERAL to stay the granting of relief pending further appellate review (dam) [Entry date 09/10/96]
		* * * * *
26	(88)	NOTICE OF FILING by defendant NATL. CREDIT UNION filing a petition for rehearing with suggestion for hearing en banc and the Court of Appeals' order dated 9/19/96 directing appellants to respond on or before 10/4/96.; exhibits (2) (dam) [Entry date 09/27/96] [Edit date 09/27/96]
		* * * * *
Oct. 25	(93)	MEMORANDUM AND ORDER by Judge Thomas P. Jackson; consolidating CA90-2948 and CA96-2312 for all proceedings; granting plaintiff's applications for declaratory and injunc

DATE		PROCEEDINGS
		groups not sharing a common bond is unlawful, and enjoining preliminarily and permanently Natl. Credit Union Admin. from authorizing credit unions to admit members not sharing a common bond and setting a status conference on 12-4-96 at 9:30 AM (N) (N) (rew) [Entry date 10/28/96] [Edit date 11/19/96]
25	(94)	SUPPLEMENTAL MEMORANDUM by intervenor NATL. ASSOC./CREDIT in 1:96-cv-02312 to highlight for the Court the importance of the damage issue in this matter, both at this preliminary level and during any further hearings on permanent relief.; exhibits (1), affidavits (2) (dam) [Entry date 11/21/96]
28	(95)	JOINT MOTION by intervenor-defendant CREDIT UNION NAT'L in 1:90-cv-02948, plaintiff AMER. BANKERS ASSN. in 1:90-cv-02948 for expedited clarification of scope of injunctive relief; exhibits (1) (dam) [Entry date 11/21/96]
		* * * * *

DATE		PROCEEDINGS
31	(97)	MEMORANDUM AND ORDER by Judge Thomas P. Jackson, directing the Order of 10/25/96 permits the addition of new groups provided they share a common occupational bond, the enrollment of new members from existing occupational groups that share a common occupational bond, and bars credit unions from enrolling new members of existing occupational groups that do not share a common occupational bond, without regard to when the groups were initially approved, including those approved more than 6 years ago. (N) (N) (dam) [Entry date 11/21/96]
		* * * * *
Nov. 15	(101)	NOTICE OF APPEAL by intervenor-defendant NATIONAL ASSOC./FEDERAL CREDIT UNIONS in 1:90-cv-02948 from order [97-1] entered on 10/25/96, order [93-1], entered on 10/31/96. FEES PAID. Attorney's to receive copies are Paul Lambert, Teresa Burke, Arthur Goldberg, Eric Goulian, A. Douglas Melamed, Christopher Lipsett and Anne Wesmann (dam) [Entry date 11/21/96] [Edit date 11/21/96]

DATE		PROCEEDINGS
15	(102)	NOTICE OF APPEAL by intervenor-defendant CREDIT UNION NAT'L in 1:90-cv-02948 from order [97-1] entered on 10/25/96, order [93-1] entered on 10/31/96, No fees, appeal by the government. Attorney's receive copies of the appeal are Paul Lambert, Teresa Burke, Arthur Goldberg, Eric Goulian, Jeffifer Kaplan, A. Douglas Melamed, Christopher Lipsett and Anne Weismann. (dam) [Entry date 11/21/96]
15	(103)	NOTICE OF APPEAL by intervenor AT&T FAMILY FEDERAL in 1:96-cv-02312, defendant CREDIT UNION NAT'L in 1:96-cv-02312 from order [17-1] in 1:96-cv-02312 entered on 10/25/96 order [15-2] in 1:96-cv-02312 entered on 10/31/96. FEES PAID. Attorney's to receive copies of appeal are Paul Lambert, Christopher Lipsett, David Malone and William Donovan. (dam) [Entry date 11/21/96]
15	(104)	AMENDED COMPLAINT by plaintiff AMERICAN BANKERS ASS in 1:96-cv-02312, plaintiff INDEPENDENT BANKERS in 1:96-cv-02312, plaintiff AMERICAS COM/ BANK

DATE	PROCEEDINGS
	ERS in 1:96-cv-02312, amending complaint [1-1] in 1:96-cv-02312. (dam) [Entry date 11/21/96]
15 (105)	JOINT MOTION by intervenor-defendant CREDIT UNION NAT'L in 1:90-cv-02948, defendant NATL. CREDIT UNION in 1:90-cv-02948, defendant NATL. ASSOC./CREDIT in 1:90-cv-02948 to stay case, or, in the alternative, for a partial stay, pending appeal of the Court's 10/25/96 injunction and pending Supreme Court review of the First National case; exhibits (19) (dam) [Entry date 11/21/96]
15 (106)	NOTICE OF FILING by defendant NATL. CREDIT UNION in 1:90-cv-02948 of a complaint filed on 11/14/96, C.A. number 96-752H, Fort Knox Feder Credit Union et al., v. National Credit Union Administration. (dam) [Entry date 11/21/96]
	* * * * *
18 (108)	MOTION filed by plaintiff 1ST NATL. BNK & TRST in 1:90-cv-02948, plaintiff AMER. BANKERS ASSN. in 1:90-cv-02948, plaintiff BANKERS TRUST/NC in 1:90-cv-

DATE	PROCEEDINGS
	02948, plaintiff RANDOLPH BANK/ TRUST in 1:90-cv-02948, plaintiff LEXINGTON STATE BANK in 1:90-cv-02948, plaintiff PIEDMONT STATE BANK in 1:90-cv-02948 for immediate enforcement of the Court's Orders dated 10/25/96 and 10/31/96; exhibits (4) (dam) [Entry date 11/21/96]
18 (109)	NOTICE OF APPEAL by intervenor NATL. ASSOC./CREDIT in 1:96-cv-02312 from order [17-1] entered on 10/25/96 1:96-cv-02312, order [15-2] entered on 10/31/96. FEES PAID. Attorney's to receive copies of appeal are Leonard Rubin, C. Dawn Causey, John Gill, Paul Lambert Eric Goulian and Brenda Furlow (dam) [Entry date 11/21/96]
19 (110)	NOTICE OF APPEAL by intervenor-defendant CREDIT UNION NAT'L in 1:90-cv-02948, intervenor-defendant AT&T FAMILY FEDERAL in 1:90-cv-02948 from order [97-1] entered on 10/31/96, order [93-1] entered on 10/25/96. FEES PAID. Attorney's to receive copies of appeal are Michael Helfer, Eric

DATE		PROCEEDINGS
		Goulian, John Ianno, William Donovan and David Malone (dam) [Entry date 11/21/96]
19	(111)	NOTICE OF APPEAL by defendant CREDIT UNION NAT'L in 1:96-cv-02312 from order [17-1] in 1:96-cv-02312, entered on 10/31/96, order [15-2] in 1:96-cv-02312 entered on 10/25/96. Fees not paid, appeal by the government. Attorney's to receive copies of appeal are Christopher Lipsett, Leonard Rubin, Robert Wiorski, Paul Lambert and David Malone. (dam) [Entry date 11/21/96]
		* * * * *
Dec. 4	(120)	ORDER by Judge Thomas P. Jackson: granting motion for immediate enforcement of the Court's Orders dated 10/25/96 and 10/31/96 [108-1] by plaintiffs in 1:90-cv-02948, denying joint motion for an expedited Rule 16 status conference [107-1] by plaintiffs in 1:90-cv-02948, denying joint motion to stay case [105-1] by NATL. ASSOC./CREDIT, NATL. CREDIT UNION, CREDIT UNION NAT'L in 1:90-cv-02948; sua sponte that a stay of this order pending

DATE		PROCEEDINGS
		appeal is denied; counsel for all parties are to furnish courtesy copies to this Court of all papers filed in the U.S. Court of Appeals; Meet Confer hearing set for 9:30 1/29/97 in 1:90-cv-02948, in 1:96-cv-02312. (N) (clv) [Entry date 12/05/96]
		* * * * *
6	(123)	ANSWER TO AMENDED COMPLAINT [104-1] by defendant NATL. CREDIT UNION in 1:90-cv-02948 (dam) [Entry date 12/09/96]
6	(124)	ANSWER TO AMENDED COMPLAINT [19-1] in 1:96-cv-02312 by defendant CREDIT UNION NAT'L in 1:96-cv-02312 (dam) [Entry date 12/09/96]
		* * * * *
10	(126)	ANSWER TO AMENDED COMPLAINT [19-1] in 1:96-cv-02312 by defendant NATL. ASSOC./CREDIT in 1:96-cv-02312 (dam) [Entry date 12/13/96]
		* * * * *

DATE		PROCEEDINGS
1997		
Jan. 23	(128)	MEMORANDUM by defendant NATL. CREDIT UNION in 1:90-cv-02948 notifying the Court that the NCUA board voted to withdraw interpretative rule and policy statement (IRPS) 96-2 (dam) [Entry date 01/24/97]
		* * * * *
29	(129)	ORDER by Judge Thomas P. Jackson: consolidating cases CA 90-2948, CA 94-1650 and CA 96-2312 pending further order of Court, and to stay case pending disposition of Case No. CA 96-847 in the United States Supreme Court, or further order of the Court, and status hearing set for 9:30 a.m. on 3/11/96; (N) (kmk) [Entry date 01/31/97]
		* * * * *

DATE		PROCEEDINGS
Apr. 17	(131)	ORDER by Judge Thomas P. Jackson: granting motion to stay all proceedings pending a decision by the Supreme Court [7-1] by NCU ADMINISTRATION in 1:97-cv-00107; and sua sponte consolidating CA 97-107 with CA 90-2948, CA 94-1650, CA 96-2312. (N) (tth) [Entry date 04/18/97]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. 96-CV-2312

AMERICAN BANKERS ASSOCIATION, ET AL.

v.

NATIONAL CREDIT UNION ADMINISTRATION, ET AL.

DOCKET ENTRIES

DATE		PROCEEDINGS
1996		
Oct. 7	(1)	COMPLAINT filed by plaintiff AMERICAN BANKERS ASS., plaintiff INDEPENDENT BANKERS, plaintiff AMERICAS COM/ BANKERS (dam) [Entry date 10/08/96]
7	(3)	MOTION filed by plaintiff AMERICAN BANKERS ASS., plaintiff-INDEPENDENT BANKERS, plaintiff AMERICAS COM/ BANKERS for temporary restraining order; exhibits (4) (dam) [Entry date 10/08/96]

DATE		PROCEEDINGS
8	(4)	MOTION filed for NATL. ASSOC./ CREDIT to intervene (dam) [Entry date 10/09/96]
8	(5)	(5) MEMORANDUM by intervenor NATL. ASSOC./CREDIT in opposition to motion for temporary restraining order [3-1] by AMERICAS COM/BANKERS, - INDEPENDENT BANKERS, AMERICAN BANKERS ASS (dam) [Entry date 10/09/96]
8	(6)	(6) RESPONSE by defendant NATL. CREDIT UNION in opposition to motion for temporary restraining order [3-1] by AMERICAS COM/ BANKERS, - INDEPENDENT BANKERS, AMERICAN BANKERS ASS.; exhibits (12) (dam) [Entry date 10/09/96] [Edit date 10/09/96]
8	(7)	RESPONSE by defendant NATL. CREDIT UNION in opposition to motion for temporary restraining order [3-1] by AMERICAS COM/ BANKERS, - INDEPENDENT BANKERS, AMERICAN BANKERS ASS. (dam) [Entry date 10/09/96]

DATE		PROCEEDINGS
9	(8)	ORDER by Judge Thomas P. Jackson: granting motion for NATL. ASSOC./CREDIT to intervene [4-1] (N) (rew)
9	(9)	SUPPLEMENTAL MEMORANDUM by defendant NATL. CREDIT UNION in support of in opposition to response [7-1] by NATL. CREDIT UNION.; Declarations of David M. Marquis, Timothy P. Hornbrook, Patricia White, Rosemary E. Helgeson, Stephen R. Punch, Monica Lopez, Errol A. Griffin, David M. Styler, Penelope Fulton, Charles L. Dawes, Marla K. Shepard and Linda S. Hannick.; attachments (1) (dam) [Entry date 10/10/96] [1:96cv2312]
10	(10)	ORDER by Judge Thomas P. Jackson granting oral motion of CREDIT UNION NATIONAL ASSOCIATION to intervene nunc pro tunc to 10-4-96. (N) (rew)
24	(11)	SUPPLEMENTAL MEMORANDUM by defendant NATL. CREDIT UNION in support of their opposition to response [6-1] by NATL. CREDIT UNION.; Declarations (1) (dam) [Entry date 10/25/96]

DATE		PROCEEDINGS
		24 (12) REPLY by plaintiff AMERICAN BANKERS ASS, plaintiff - INDEPENDENT BANKERS, plaintiff AMERICAS COM/BANKERS in support of their motion for temporary restraining order [3-1] by AMERICAS COM/ BANKERS, - INDEPENDENT BANKERS, AMERICAN BANKERS ASS.; exhibits (17) (dam) [Entry date 10/25/96]
24	(14)	SUPPLEMENTAL MEMORANDUM by intervenor NATL. ASSOC./ CREDIT in support of their opposition [6-1] to plaintiff's motion for injunctive releif by NATL. CREDIT UNION (dam) [Entry date 10/25/96]
25	(15)	COPY OF MEMORANDUM AND ORDER by Judge Thomas P. Jackson; consolidating CA90-2948 and CA96-2312 for all proceedings; granting plaintiff's application for declaratory and injuntive releaf, directing membership in a federal credit union by individuals or groups not sharing a common bond is unlawful, and enjoining preliminarily and permanently Natl. Credit Union Admin. from authorizing credit unions to admit

DATE	PROCEEDINGS
	members not sharing a common bond and setting a status hearing set for 9:30 12/4/96 (N) (rew) [Entry date 10/28/96] [Edit date 11/19/96]
25 (—)	REMARK. ALL DOCKET ENTRIES AS OF THIS DATE WILL BE FOUND IN THE LEAD CASE WHICH IS 90-2948. (dam) [Entry date 11/20/96]

[Agency letterhead omitted]

October 28, 1983

The Honorable Fernand J. St Germain
Chairman
Committee on Banking, Finance
and Urban Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of October 3, 1983, requesting information on the status of the State Department Federal Credit Union (FCU) and on certain NCUA regulatory policies. I am pleased to provide you and the members of your Committee responses to your inquiries which I hope will address your concerns. Like you, we are determined that the credit union movement meet with continued success and our policy decisions are certainly intended to reflect this.

I share your interest in arranging a meeting in the near future as I am convinced that such a dialog would not only further the resolution of these matters, but could produce even more fruitful solutions to future problems and assist in maintaining the Committee's confidence in our agency.

STATE DEPARTMENT FEDERAL CREDIT UNION

As you noted, the publicity surrounding the operations of the State Department FCU was considerable. On August 18, the Washington Post devoted in excess of one half page to a detailed description of the credit union's current situation. Essentially there were two stories in the article: (1) that NCUA had placed the credit union on its problem list and was maintaining it under close surveillance; and, (2) that for the past year a group of credit union members, dissatisfied with long lines and the failure to get positive results on their complaints, had been actively working to get things changed.

Before giving you the details on our supervisory actions, I want to comment on the second part of the article because it so dramatically portrays why credit unions are different from other financial institutions and what the term "member owned and member operated" really means. Suppose, for example, that the long lines were in a bank or a savings and loan. One could scarcely expect a similar chain of events as occurred within the credit union—a small number of members organized a committee, a petition was signed by 600 people, detailed expense records (such as meals purchased by credit union board members) were provided to the Post, one of their members was appointed to the board of directors, and finally, as the headline to another Post article on September 13 stated, "State Department Credit Union General Manager Dismissed." This story clearly demonstrated that, even in a large credit union, the members continue to play a part in the decision-making process.

As far as the credit union's condition is concerned, it remains on our problem list and we continue to work closely with the management of the credit union. A number of very positive steps have been taken by the credit union since our involvement in late June which we are hopeful will begin to impact positively on the credit union's financial condition shortly. The major steps taken are as follows: restructuring the share certificate program; reduction in rates paid on several account classifications; par value of $50 established; fees established for certain services; development of more aggressive loan programs; approval of sale of building; reinstatement of early withdrawal penalty on share certificates; reduction in number of staff; curtailment of travel expenses; and dividends for the fourth quarter of 1983 will only be paid from current earnings.

While many factors contributed to the deterioration in the credit union's condition (unrealistic expenses, $180,000 write off from Penn Square, free services for members, etc.) the main problem for this credit union was its continued aggressive attraction of high yielding shares without a corresponding increase in lending to its members. In short, it was paying too high a rate on dividends to its members commensurate with the amount of loans it was able to place. More and more reliance was placed on investments and, as short term investment rates began to drop in late '82, investment income became inadequate to cover the cost of funds.

With respect to NCUA's rating of the credit union, let me briefly outline the history of our most recent supervisory actions. A routine examination was conducted as of December 31, 1981 and the credit union received a "CODE 1," which is our highest rating and

signifies that the credit union is in very good condition. It was shortly after this time that the credit union's policy of aggressively seeking new shares, especially IRA's with high rates of return, began to have a particularly adverse impact. This resulted in the deterioration of the credit union's financial condition. This deterioration was detected in June of this year during the review of an examination which had been completed on May 4, 1983. This exam looked at the credit union records as of March 30, 1983 which is 15 months after the last previous exam of December 31, 1981. One of our major efforts has been to shorten the time between exams from a previous average of about 24 months to our present schedule of once a year. We believe this stepped up schedule was very important in the case of State Department FCU as this early detection makes the potential recovery much more likely. On this May 4th exam, however, our examiner failed to follow the NCUA Examination Guidelines and submitted an evaluation of CODE 1. Nevertheless, our supervisory examiners in reviewing this evaluation determined that the credit union's condition could not be a CODE 1 and they immediately scheduled another exam of the credit union. This exam began on June 27th and when it was completed the credit union's condition was changed to CODE #4 and it was placed under our surveillance. The examiner has been thoroughly briefed on the particulars of his mistake and his work is being reviewed closely to ensure proper adherence to our guidelines.

"CUE-84" PROGRAM

"Credit Union Expansion-84" is a name which was chosen to set a theme for the celebration of the 50th

anniversary of the Federal Credit Union Act in 1984. While I do not have budget information from other agencies, I am certainly aware of the 50th year celebration activities of the FDIC earlier this year and of similar activities planned by other agencies. Our activities along these lines mainly consist of providing information about credit unions and assisting groups to start new credit unions. Activities such as these are authorized under Section 120 of the Federal Credit Union Act (12 U.S.C. § 1766). The relevant paragraphs of Section 120 are as follows:

(a). Sec. 120(i)(2) and (3):

> (2) to expend such funds, enter into such contracts with public and private organizations and persons, make such payments in advance or by way of reimbursement, and perform such other functions or acts as it may deem necessary or appropriate to carry out the provisions of this Act; and
>
> (3) [To] pay stipends, including allowances for travel to and from the place of residence, to any individual to study in a program assisted under this Act upon a determination by the Board that assistance to such individual in such studies will be in furtherance of the purposes of this Act.

(b). Sec. 120(F)(2)(A) which in 1970 authorized NCUA to promote low income credit unions.

> (2)(A) It is authorized to establish a program of experimental, developmental, demonstration, and pilot projects, either directly or by

> grants to public or private nonprofit organizations, including credit unions, or by contracts with such organizations, designed to promote more effective operation of credit unions, and related consumer counseling programs, serving the poor.

This effort at promoting and assisting in local credit union development was continued in 1979 when $6 million was appropriated under P.L. 96-123 for the Community Development Credit Community Services Agency to provide seed money and counseling (training and technical assistance) in making selected credit unions a growing force for community betterment. This activity continues today in concert with the Office of Community Services (Department of Health and Human Services) under the provisions of the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35). Proposed Regulations were published in the Federal Register on August 16, 1983 for a Community Development Credit Union Program that will hopefully be finalized later this year. Approximately $2 million will be available for credit unions in addition to the resources of a revolving fund for future activities.

Before returning to CUE-84 specifically, let me comment further on this agency's role as a facilitator in the expanding credit union movement. The Federal Credit Union Act of June 26, 1934 is entitled:

> "An Act to establish a Federal Credit Union System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes through a national system of

> cooperative credit, thereby helping to stabilize the credit structure of the United States."

This concept of reaching more and more people through a national system of cooperative credit was particularly strong in the early days of the Federal regulatory agency when examiners routinely spent time on chartering efforts. Over the years, this activity has evolved into one in which the agency and its regional offices serve as information providers to persons interested in credit union services. Once a group is interested, we have provided, and continue to provide, information on how to start a Federal credit union.

The CUE-84 program is part of this overall effort of participating in credit union growth not only to facilitate it, but to ensure it is done in a safe and sound manner and to maximize the chances of success for each new group.

CUE-84 as our Annual Report (p. 11) indicates:

> "[I]s a national cooperative effort involving NCUA, state regulators, state leagues and others interested in strengthening the credit union movement . . . NCUA's role was to support the effort from a regulator's perspective. This included updating chartering manuals and making information available about current credit union membership policies."

Thus far, we have expended less than $25,000 on this effort. Most was spent on publications such as the three I have enclosed: (1) Volunteer Organizers Guide; (2) Facts About Federal Credit Unions; and (3) Credit Unions for College Students. Of course, none of these particular funds are appropriated, but come from the credit unions themselves. We have also tried

to highlight and give acknowledgement to certain new charters, such as the Georgetown University Students Federal Credit Union, in order that other similar groups might be inspired to take action in starting their own credit union.

We are very pleased to note that growth in credit union savings during the first six months of this year was a very strong 22.3% (annualized rate) as compared to 6.1% for banks and 13.4% for savings and loans.

CREDIT UNION LOAN RATE CEILING

On May 12 of this year, the NCUA Board considered the loan rate ceiling for FCUs. Had it not acted, the rate would have automatically returned to 15% on September 4, 1983. I would like to review market rates not only for the six months prior to the Board action (as required in the statute) but also for the period up to September 4, to further assess the need of the Board's action.

The rate on 90 day T-Bills as of December '82 was *7.94%*; by May of '83, it was *8.19%*. The rate on one year T-Bills in December of '82 was *8.23%*; in May of '83, it was *8.90%*. This combined with the rising cost of credit union funds was sufficient justification for the Board action as far as the market rate requirement was concerned. For the record, the following rate increases occurred in the period from December 82 to September 4: Fed Funds + 50 basis points; 90 day T-Bill + 106 basis points; 180 day T-Bill + 99 basis points; 1 year T-Bill + 104 basis points; 30 day CDs + 64 basis points; 90 day CD's + 73 basis points; and 180 day CD's + 84 basis points.

When evaluating interest rate levels against credit union safety and soundness, the Board considered

that: at the time of the Board action, 38.6% of all FCUs had unsecured loan rates in excess of 15%; the number of FCUs offering money market accounts doubled from year-end '82 and the amount in these accounts went from $1.2 billion to $3.6 billion; during this same period, the number of FCUs experiencing losses increased by 540 to 3,112 and the total amount of negative earnings for these FCUs increased by $13 million to $76.7 million; further, during this same period the ratio of reserves to assets fell from 3.9% to 3.6% and that of reserves and undivided earnings to assets fell from 6.4% to 6.0% (this is the lowest the ratio has been since December 1980 when the old 12% loan rate ceiling caused some serious problems).

As we indicated in our final rule, the trends in liquidity, capital, earnings, and growth were mixed and in a state of uncertainty when viewed on a system wide basis. However, the negative aspects as indicated above were sufficient to convince the Board that individual credit unions would certainly be threatened by its failure to act. This was especially true when we looked at our supervisory problem case credit unions. For example, the impact on State Department FCU of suddenly lowering all loan rates to 15% would have been quite serious. As evidenced by our earlier discussion of this credit union, a sudden reduction in their already marginal earnings situation would have made the recovery more difficult.

Finally, our consultation letters to the appropriate committees of the Congress and the Department of Treasury, Federal Reserve Board, and other regulators were sent on April 25, and we did not receive any input concerning the possibility of failing to meet statutory requirements. I recall that there may have been suggestions concerning the possibility of a rate

other than 21% but, of course, no rate other than 15% is permitted unless the requirements of the statute are met.

COMMON BOND

To put NCUA's common bond policy in perspective, I would like to relate certain historical events in the evolution of the common bond as I am familiar with them. The origins of cooperative credit were based on the principle that, when considering creditworthiness, a person's reputation and character were of as much value as his possessions. Persons of "modest means" were unable to obtain favorable credit because of their lack of wealth and credit unions were formed to alleviate this situation. The earliest credit union on this continent was established in 1900 in the city of Levis, Canada. To become a member "any urban or rural resident of Levis had to subscribe to at least a five-dollar share and agree to pay for it at the rate of ten cents each week . . . to be elected to membership, the applicant had to be judged as 'honest, punctual in his payments, sober, and of good habits, industrious and laborious.'" *

As can be seen, there was not a limitation imposed on potential membership but rather a general principle which would permit the credit union to limit actual membership. This pattern was followed in the Massachusetts Credit Union Act in 1909. The law provided for at least seven persons to apply for a charter, democratic operation of the credit union, one member, one vote, no compensation of directors, but there was no mention of any limitations on member-

* Moody and Fite, The Credit Union Movement, Origins and Development 1850 - 1970, at 22 (1971).

ship. Again, the credit union could limit membership as it saw fit. One of the earliest Massachusetts credit unions was the Industrial Credit Union which selected a broad charter permitting it to choose members from both city residents and those working in the Boston area.

The Massachusetts credit union laws continue to follow this practice of not attempting to define a credit union's membership. Presently there are five states whose laws place no restrictions on credit union membership. These are Rhode Island, Massachusetts, New Hampshire, South Carolina, and Utah. Of course, in practice each credit union organizes itself through its bylaws to serve a field of membership.

The early success of a national credit union movement is owed to the singular efforts of a very limited number of persons. Beginning in Massachusetts, they developed a plan to organize credit unions nationwide. Part of the plan was to secure passage (state by state) of state credit union laws and, as that project bogged down, a Federal statute.

The other part of the plan was to organize as many credit unions as possible. It was in the plan to promote and organize use. While many of the early credit unions were serving geographic areas, it was found that organizing credit unions of that nature was slow and tedious. It was much easier to promote the idea of a credit union to a group or an association whose members already had a common bond. Therefore the promotion plan consisted of contacting leaders of fraternal and religious organizations, factories and business firms, cooperative associations, and agricultural associations. The impact of this plan is evidenced today in the distribution of credit unions

with only 4.5% having a geographic field of membership.

The common bond, therefore, had its most powerful applications in promoting or organizing a credit union rather than, for instance, serving as a good measurement of credit union viability. For example, those credit unions in Rhode Island which are chartered to serve the entire state are just as viable as those serving the employees of small manufacturing companies.

Therefore, an important part of the tradition of the common bond is its use in expanding the movement towards whatever its full potential might be. Or, as stated in the Federal Credit Union Act "a national system of cooperative credit."

Because they were organized in this fashion, credit unions are most commonly identified as those institutions whose membership is limited by a common bond. This view has served a useful purpose in helping to perpetuate a unique identity for credit unions and it continues to do so today. The Federal Credit Union Act refers to membership as "limited" to certain groups as do many of the state credit union laws.

The chartering policies of NCUA and its predecessors have tried to accommodate the very rapid growth in credit unions as well as changes in both the economy and the lifestyle of our country.

For example, military credit unions serve members on overseas bases. When the first plant containing a credit union was closed, a decision had to be made on whether to shut down the credit union or to "modify" the common bond and include certain additional persons in the nearby community thereby retaining a very valuable and useful institution. Every merger is in a small way a further modification of traditional fields of membership; but certainly if a new viable

credit union emerges, it was a good decision. When the Federal Credit Union Act was enacted, the concept of a shopping center or an industrial park was unknown. Yet recent NCUA chartering policy addressed the reality of these entities by permitting a single credit union to serve a small group of businesses in the center or park. That same policy also permitted occupational credit unions to convert to community charters.

Our most recent policy changes are in concert with the concept of combining groups of employers as was done in the centers and parks, but does not pursue the pure geographic charter. Rather than have an occupational credit union convert to a community charter and serve everyone in a geographic area, we felt it was more appropriate to limit the expansion of the credit union to serving other select or small employee groups that already exist in the vicinity of the credit union.

I believe that the stability achieved by credit unions is a result of a flexible chartering and expansion policy which permits credit unions to extend their services to more people and thereby strengthen their position as a viable responsive financial institution. This has been done without abandoning the common bond characteristic. Our latest policy also reflects the major changes occurring in smokestack America with an ever increasing number of factories closing down while simultaneously there has been a major increase in industries with less than a hundred people.

NCUA'S POLICY

The Federal Credit Union Act prescribes membership in a FCU as consisting of ". . . groups having a

common bond of occupation or association, or to groups with a well-defined neighborhood, community, or rural district." (12 U.S.C. § 1759) One of the key words in this requirement is "groups." In the past, separate groups of people could join together to form a FCU or join an existing credit union if each group shared the same type of common bond with each of the other groups. Over time, as chartering policies continued to evolve, it was seen that some groups were too small either by themselves or when grouped together to support a viable credit union. Thus, unless these people are able to qualify for a community charter, they can not avail themselves of credit union service. This did not appear to be the intent behind the Federal Credit Union Act. For a number of years, this Agency utilized the "Industrial Park" or "Shopping Center" common bond as previously mentioned. However, this concept had limited application.

Since, the Act does refer to "groups," we again reviewed agency policy. Our most recent revision permits groups, each group having its own common bond, to pool their resources and establish their own credit union. They did not lose the common bond characteristic but the result was a credit union that could serve groups not otherwise eligible for a viable credit union charter and one which could survive hard economic times. Credit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps, whereas a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members. That, we believe, was the intent of the Federal Credit Union Act.

As far as our long term common bond policy objectives are concerned, I would hope and expect that NCUA will continue to make those adjustments which are required to adjust to changing social conditions and to bring credit union services to groups desiring such services but not yet served.

CLF - U.S. CENTRAL CREDIT UNION

U.S. Central Credit Union became a member of the Central Liquidity Facility (CLF) in September of 1980. It joined as an Agent Group Representative for six corporate credit unions. This NCUA Board action was authorized under Section 304(b) of the Federal Credit Union Act (12 U.S.C. § 1795(c)) which sets forth the conditions under which a "credit union or group of credit unions, primarily serving other members, may be an Agent member of the Facility." I concur with the decision made by the NCUA Board at that time and I feel it was a necessary first step in the action which the Board is just now completing.

The CLF was established with full recognition of the existing private system (the 46 corporate central credit unions and the U.S. Central Credit Union). In fact, it was designed to operate in concert with and to provide a back up for the private system. Since CLF participation was made voluntary, all arrangements concerning participation must be agreed to by both parties and, of course, be in compliance with statutory requirements.

As you know, Mr. Chairman, credit union liquidity has been fairly high recently and membership in the CLF has remained disappointingly low (approximately 25% of all credit unions). We want to avoid a situation whereby a liquidity crisis might strike with so many credit unions outside the umbrella of the

CLF. Also it is important that the CLF continue to receive its Congressionally authorized borrowing authority in an amount adequate to cover the entire system. The assets of U.S. Central are $9 billion and the CLF has current assets of $143 million with borrowing authority of $600 million and an emergency draw of $100 million. When fully funded, the CLF will be in a much stronger position to fulfill its role and to ensure that it continues to receive its full borrowing authority.

The participation of U.S. Central in the CLF was both anticipated and structured. Your committee outlined both procedures and concerns regarding this participation. Your comments in the Congressional Record (November 9, 1978, E-5952, 53) which serve as the Committee Report on the CLF make certain pertinent points, which we have tried to follow. First, a "corporate (central) credit union may become an agent member by obtaining the Administrator's (Board's) approval, agreeing to examination, reporting requirements, and regulations established by the Administrator (Board). . ." For your information, we have established in our regulations on agent members certain criteria which must be met. Among these are: written management policies, adequate internal controls, sound financial condition with adequate reserves, surety bond coverage, adequate records pertaining to CLF, and an annual independent audit by recognized auditor with copy to CLF.

Second, a corporate (central) may become an agent member by purchasing stock equal to one-half of one percent of the assets of those traditional credit unions within its membership or "in the case of a corporate credit union serving other corporates (U.S. Central), by purchasing stock equal to one-half of one

percent of the assets of those traditional credit unions served by its corporate members." In the increased membership plan being finalized, U.S. Central will meet this requirement by subscribing on behalf of all of the credit unions being served by its corporate members.

Third, your report expressed the concern that "No corporate central credit union shall become a member with agent classification unless the Administrator (Board) determines that any direct or indirect subsidy granted to such corporate central credit union by any trade association or similar organization or other organizations doing business with credit unions shall not have an adverse effect upon such agent's ability to act as the official representative of the facility." I sense that your letter reflects a continuation of this very legitimate concern. I further believe that it is incumbent on me to alleviate that concern, and I hope I am successful so that we both can enjoy the success of this moment; for it is in this final step that your goal that "the benefits of CLF be available directly or indirectly to all credit unions in America," is actually reached.

First, there is incorporated into our agent regulations an additional criterion that "there are no practices, procedures, policies, or other factors that would result in discrimination by the central credit union among natural person credit unions or inhibit its ability to act independently in its role as an Agent member of the Facility."

Further, in accepting U.S. Central as an agent member in 1980 and in the working relationship since that time, we have become very familiar with it as a corporate entity; its charter, its method of operation, its board of directors, its relationship with credit

union trade associations and other organizations, and its function in the credit union liquidity system.

The U.S. Central Credit Union was chartered in March of 1974 under the Kansas Credit Union Act. It operates without profit as a central credit union for the mutual benefit of its membership. It functions in a manner similar to a "bankers' bank" by providing wholesale financial and payments service to its corporate members and their member credit unions. Presently U.S. Central is comprised of 41 corporates and its assets are approximately $9 billion.

It provides liquidity to this credit union network through re-distribution of surplus funds, borrowings in the banking industry, and more recently of course, from the CLF. In addition it serves as an investment vehicle, provides data processing services, net settlement securities safekeeping, corporate share drafts, and wire transfer of funds.

The Board of U.S. Central is a seven-member Board with three year terms constituted as follows: The Chairman is the Chairman of the Association of Credit Union League Executives; the Vice Chairman is the Chairman of the Corporate Forum Committee (selected by the managers of the 41 corporate credit unions comprising the corporate forum); other members are: Chairman of Credit Union National Association; President of Credit Union National Association; Chairman of Kansas Credit Union League, a Corporate Manager selected by the 41 corporates; and an additional Board member of Credit Union National Association. Membership consists of both state chartered and federally chartered credit unions.

Because of the uniquely close relationship between the credit union movement and trade associations (one trade association actually preceded the industry), the operating structure remains very close-knit. While these relationships continue to contribute significantly to credit union growth, viability, efficiency, and survival, we are ever mindful of the potential for misuse of trust or unwarranted use of power.

Therefore the period from September of 1980 when U.S. Central first joined the CLF to the present has given us the opportunity to closely examine its operations, secure certain changes in the corporate system of benefit to the CLF, and to participate in each step of the development of the strategy and plan to more fully provide CLF services to the credit union movement.

While the examinations during this period of U.S. Central itself have been satisfactory, there has been a major effort to substantially increase the standards of responsibility and conduct of its corporate members. This was to ensure that all corporates were subscribing to those standards reached by the six corporates represented by U.S. Central in 1980.

This voluntary effort is most commendable and has been very productive. Through the auspices of the Corporate Forum, standards have been adopted which secure a high level of operational excellence throughout the corporate network. Areas covered by such standards include; programs and services, investments and loan policies, operating ratios and spreads, asset/liability management practices, operating policies and risk management policies and practices. This effort is one of the reasons that the Corporate Forum could confidently make the decision to go ahead with the plan to use its Kansas-based U.S. Central to fund the entire CLF stock subscription. It was also an important factor in the CLF's decision.

The president of the CLF participated in the recent deliberations of the Capitalization Commission in developing a satisfactory arrangement for U.S. Central to represent its corporate members. I have studied the operational arrangement between the CLF and U.S. Central and I am very satisfied with it. I can assure you that the CLF will lose none of its independence but rather will be in a stronger position to meet liquidity demands. The details of this arrangement are contained in the NCUA board Memorandum of September 23, which was provided to your staff. A copy is also enclosed.

The good news about the CLF really comes in two parts. First, it adds a vital element to the safety and soundness of the credit union financial system. Second, the cost/benefits of this dramatic increase in CLF members are quite remarkable. Since the CLF will not need to increase its staff, there will be no additional costs. Therefore, for the same costs, membership in the CLF can grow from 5,300 credit unions to over 18,000. Over 90% of all credit unions will have access to CLF financing and those remaining outside the CLF will have a full choice of joining direct or through an agent member. I am most pleased that this step has been taken and I can assure you that this larger membership role for U.S. Central will continue to receive our close attention.

Further, I believe the timing of this action was excellent. While credit union liquidity is high, credit unions are experiencing the first real expansion in their loan portfolios in three years. As the recovery continues, credit union loan demand should increase even more. With the CLF in position to serve the entire movement, credit unions are well positioned for the future. Additionally, there are current public

policy debates concerning efficiency in government and the relationship between public and private sector. In particular, the need for a separate credit union lender serving only 25% of all credit unions is subject to close scrutiny. The membership arrangement through U.S. Central and the 41 corporates addresses both of these concerns.

NCUA REGULATORY PHILOSOPHY

Mr. Chairman, I know this response has been lengthy, but I do want to use this opportunity to address any concerns you might have about deregulation as we have approached it at NCUA. It has been our philosophy that, consistent with safety and soundness, as much choice as possible should be returned to each credit union board of directors. With the Congressional decision to totally deregulate savings rates by 1986, with continuous technological change, and with ever increasing competition from both within and outside of the financial community, it became a matter of survival to untie the restrictions of a highly regulated industry. We have proceeded to do just that and today credit unions have more experience in a deregulated environment than any other class of institutions and they are managing very well.

Nevertheless, I believe that there are necessary trade-offs to deregulation. You can't simply deregulate in a vacuum and assume the system will stay together. I want you and the Committee members to know what our plans were to compensate for deregulation from our regulatory perspective.

First, we felt that as regulatory safeguards come down, supervision must be increased to take its place. We adjusted the resources of the agency towards its on-site examination role and I am pleased to inform

you that we have completed an examination of every Federal credit union during the last 12 months and will continue to do so. In addition, we will continue to closely monitor those experiencing difficulties.

Second, the completion of the CLF membership plan will add a significant measure of back up liquidity to augment the stability of the credit union system.

Third, we are delivering to you a legislative proposal designed to dramatically increase the size of the National Credit Union Share Insurance Fund. As you know, this Fund was started without any government capitalization as were the other insurance funds, but rather has evolved purely from the insurance premiums assessed on insured credit unions. While it has managed to reach a size where it is .308% of credit union assets, continued credit union growth and increased merger/liquidation activities are likely to maintain the Fund at or near its present level. In a deregulated environment, it is advisable to find a method to enable the Fund to reach the level of 1% of credit unions' assets set forth by statute as its "normal operating level" (12 U.S.C. § 1782(h)(3)). Our proposal will establish a credit union deposit of 1% of insured shares. This deposit will be refundable should a credit union voluntarily leave the Fund. The amendment will further provide that the NCUA Board shall rebate insurance premiums as long as the Fund remains within certain limits. I believe this amendment will receive the support of the credit union movement and that it will permit the continued safe and secure operations of an insurance fund uniquely adapted to the needs of credit unions.

The deregulation plan I have outlined is designed to position this agency to be as responsive as possible in

meeting future credit union problems and to have a depth of resources to meet the unexpected.

In closing, I sincerely hope my comments have been responsive and that the policies and activities of this agency have been delineated for the Committee's use. I reiterate my desire to meet with you personally and to hear any further comments or suggestions concerning our activities.

Sincerely,

E. F. CALLAHAN
Chairman

Enclosures: 4

February 11, 1997

Marcus B. Schaefer, President/CEO
AT&T Family Federal Credit Union # 07840
P. O. Box 26000
Winston-Salem, NC 27114-6000

Dear Mr. Schaefer:

Your request to amend your charter has been approved as indicated below. We have approved the housekeeping changes in clauses 5, 9, 11, 20, 22, 34, 36, 39, 57, 60, 65, and 85 involving only company name changes with the understanding that there is no increase in potential membership. **No increase in potential membership is authorized with this amendment.**

The amendment may be placed in effect immediately by taking the following action:

1. Adoption, within 90 days of the date of this letter, by the board of directors at a meeting held in accordance with the procedures in Article XXI of your credit union's bylaws which are as follows:

a. All directors are given prior written notice, containing a copy of the proposed amendment, of said meeting.

b. Two-thirds of the authorized number of board members vote in favor of the amendment.

2. Proper completion and distribution of the enclosed certification of resolution form as follows:

a. The date of the board meeting must be entered on the original in ink or typed, and the form must be signed (in ink) by the board chairperson and secretary.

b. The properly dated and signed certification of resolution form together with this letter, must be filed with your credit union's official charter. There is no need to provide an executed copy to the National Credit Union Administration.

Accordingly, AT&T Family Federal Credit Union is hereby authorized to amend Section 5 of the Charter to read as follows:

The field of membership shall be limited to those having the following common bond:

1. Employees of AT&T and Lucent Technologies, (Rev. 5/13/96) formerly AT&T Technologies, Inc., AT&T Network Systems, and Bell Telephone Labs who work in or are supervised from Forsyth, Guilford or Alamance Counties, North Carolina or Richmond or Radford, Virginia; employees of AT&T Solutions, a division of AT&T Corporation, who work in or are paid from Jacksonville, Florida; (App. 2/7/96)

2. Employees of Lee Apparel Company who work in Pulaski, Virginia;

3. Employees of Pneufamil Corporation, its subsidiaries and affiliates, Luwa Corporation, Southeastern Metal Products and Zellwater Uster Inc., who work in or are supervised from Charlotte, North Carolina;

4. Employees of Coca-Cola Bottling Company, Consolidated, who work in or are paid from Charlotte, North Carolina; (Rev. 8/18/93)

5. Employees of Pharr Yarns (formerly Stowe Mills, Inc.-Revised 2/11/97) who work in McAdenville, Belmont, or Spenser Mountain, North Carolina, or Clover, South Carolina, and the following companies (operating under common ownership) at the following locations:

Crescent Spinning Company, Inc., - Belmont, North Carolina,
United Spinners Corporation - Lowell, North Carolina,
Pharr - Palomar, Inc., - Buena Park, California,
McAdenville Foundation - McAdenville, North Carolina,
Pharr Yarns & Company - Dalton, Georgia,
Pharr Yarns Sales, Inc., - New York, New York,
Belmont Land & Investment Company - McAdenville, North Carolina,
Strand Development Corporation - Myrtle Beach, South Carolina,
Avon Associated Warehouse Company - Gastonia, North Carolina,
Norman Associates - Cornelius, North Carolina,
Lodge Associates - Myrtle Beach, South Carolina;

6. Employees of Geneva Corporation and its wholly-owned subsidiaries - (Keystone Detroit Diesel Allison, Inc., Pella Window and Door Company of North Carolina, J. R. Morton Company, George C. Brown and Company, Inc., and Covington Diesel, Inc.), who work in Greensboro or Charlotte, North Carolina, Wexford, Pennsylvania or Maryland Heights, Missouri; employees of Cross Sales & Engineering Company and R. H. Barringer Distributing Company, Inc., who work in or are paid from Greens-

boro, North Carolina; employees of Radiator Specialty Company and Ronson Hydraulic Units (N.C.) Corporation who work in Charlotte, North Carolina; employees of Renfro Corporation who work in or are paid from Mount Airy, North Carolina; employees of Microtron Abrasives, Inc., who work in or are paid from Pineville, North Carolina;

7. Employees of Engineered Controls International, Inc. (formerly RegO Products) who work in Elon College, North Carolina; employees of Klaussner Furniture Industries, Inc., who work in Asheville or Greensboro, North Carolina;

8. Employees of Draper Corporation who work in Greensboro, North Carolina or Spartanburg or Anderson, South Carolina;

9. Employees of Globe Security Systems who work in the Carolina District Consisting of Asheville, Charlotte and Greensboro, North Carolina and Columbia, South Carolina; employees of Danaher Tool Group, (formerly Easco Hand Tools, Inc.-Revised 2/11/97) who work in or are paid from Gastonia, North Carolina;

10. Employees of Black & Decker Corporation who work in Asheboro, North Carolina; employees of The Goodyear Tire & Rubber Company who work in Randleman, North Carolina;

11. Employees of Allen Industries (formerly Allen Displays, Inc.) who work in or are paid from Greensboro, North Carolina; (Revised 2/11/97)

12. Employees of Biggers Brothers, Inc., who work in or are paid from Charlotte, North Carolina;

13. Employees of Martin Processing, Inc., who work in Martinsville, Virginia; employees of Amsco Products who work in Wytheville, Virginia; employ-

ees of Elk Creek Raycarl Products who work in Elk Creek, Virginia;

14. Employees of Automatic Transmission Shops, Inc., who work in Gastonia, North Carolina; employees of Florida Steel Corporation, Steel Mill Division and Reinforcing Steel Division, who work in Charlotte, North Carolina; employees of Eden Yarns, Inc., a division of Sara Lee, who work in Martinsville, Stuart, Floyd, Gretna or Rocky Mount, Virginia or Eden, North Carolina;

15. Employees of Nalle Clinic who work in or are paid from Charlotte, North Carolina; employees of Southern Optical Company and its wholly-owned subsidiaries, Piedmont Optical Company, Inc., Carolina Optical Supply, Inc., Pioneer Optical Service, Inc., Southern Optical Company of Maryland, Inc., Southern Optical of West Virginia, Inc., Southern Optical Company of Virginia, Southern Optical Company of Georgia, Inc., Williams Optical Company, Inc., and Reid Optical who work in or are paid from Greensboro, North Carolina or Nashville, Tennessee;

16. Employees of Inmar Enterprises, Inc., and its subsidiaries, Carolina Manufacturer's Service, Inc., and Venture Management who work in or are paid from Winston-Salem, North Carolina; employees of Konica Manufacturing U.S.A., who work in Greensboro, North Carolina; employees of Intercraft Industries Corporation (Eastern Division) and John Boyle & Company who work in or are paid from Statesville, North Carolina;

17. Employees of Pulaski Community Hospital and Wythe County Community Hospital who work in or are paid from Pulaski or Wytheville, Virginia;

18. Employees of Ace Hardware Corporation, Retail Support Center Operations, who work in Huntersville, North Carolina;

19. Employees of the Duke Power Company and its wholly-owned subsidiaries Crescent Land and Timber Corporation, Duke Engineering and Service, Inc., and Mill-Power Supply Company who work in or are paid from Charlotte, North Carolina;

20. Employees of Coca Cola Bottling Company Consolidated, Georgia/Florida Division who work in or are paid from Columbus, Georgia; active members of the Virginia Pharmaceutical Association headquartered in Richmond, Virginia; employees of Square D Company who work in or are paid from Monroe, North Carolina; employees of CIBA-GEIGY Corporation who work in Greensboro, North Carolina; employees of Ciba Specialty Chemicals (formerly CIBA-GEIGY Corporation-Revised 2/11/97) who work in Charlotte, North Carolina; employees of A T & T American Transtech who work in or are paid from Jacksonville, Florida or who work in New York, New York, Boston, Massachusetts or Wall Township, New Jersey;

21. Employees of American of Martinsville and its division, American Furniture Company, who work in Martinsville, Virginia; (Rev. 6/21/96) employees of Dee Shoring Company, Inc., who work in Richmond, Virginia;

22. Employees of Cogentrix, Inc., who work in or are paid from Charlotte, North Carolina; employees of these wholly-owned subsidiaries of Cogentrix, Inc.: Staff-Additions, Inc., who work in Charlotte, North Carolina and ReUse Technology, Inc., who work in Kennesaw, Georgia or Rocky Mount, North Carolina; employees of Lecom Communications (formerly Lex-

ington Telephone Company-Revised 2/11/97) who work in or are paid from Lexington, North Carolina; employees of Corn Products who work in Winston-Salem, North Carolina; employees of Pepper's Ferry Regional Wastewater Treatment Authority who in work or are paid from Radford, Virginia; employees of Maxwell Communications Corporation, and Standard Drug Company, Inc., who work in or are paid from Richmond, Virginia;

23. Employees of East West Partners of Virginia who work in or are paid from Richmond, Virginia; employees of Paul B. Williams, Inc., who work in or are paid from Greensboro, North Carolina; employees of Takatori Intech Corporation who work in or are paid from Charlotte, North Carolina;

24. Employees of Morton International, Group Powder Coatings Division, who work in or are paid from Wytheville, Virginia;

25. Employees of American Tobacco Company who work in or are paid from Richmond, Virginia; employees of Western Auto Supply Company who work in Gastonia, North Carolina;

26. Employees of AT&T Universal Card Services Corporation (a wholly-owned subsidiary of AT&T) who work in Jacksonville, Florida, Columbus, Georgia, Basking Ridge, New Jersey and Salt Lake City, Utah; (Rev. 7/2/93)

27. Individual members of the Piedmont Independent College Association of North Carolina in Greensboro, North Carolina;

28. Employees of Lucia, Inc., who work in Winston-Salem or Elkin, North Carolina;

29. Employees of Baldor Electric Company who work in Charlotte, North Carolina; employees of Force, Inc., who work in Christiansburg, Virginia;

30. Employees of Owens-Brockway Glass Containers who work in Winston-Salem, North Carolina;

31. Employees of Penn Engineering & Manufacturing Corporation, North Carolina Division, who work in Winston-Salem, North Carolina; employees of Eveready Battery Company, Inc., who work in Asheboro, North Carolina; employees of Stone Container Corporation, Corrugated Container Division, who work in Lexington, North Carolina; employees of Great Coastal Express, Inc., who work in or are paid from Richmond, Virginia; employees of Diversified Apparel Resources, Inc., who work in Pulaski and Council, Virginia; (Rev. 7/14/95 to add Council, Virginia);

32. Employees of Micro View, Inc., who work in or are paid from Charlotte, North Carolina; employees of Day Engineering, Day Data Systems and H. L. Yoh, divisions of Day & Zimmerman, Inc., who work in Charlotte or Greenville, North Carolina; employees of General Hardware Company Greensboro who work in Greensboro, North Carolina; employees of WGHP-TV who work in High Point, North Carolina; (Rev. 5/23/95)

33. Employees of Washburn Graphics, Washburn Direct Marketing, and Graftech Corporation who work in or are paid from Charlotte, North Carolina;

34. Employees of Reynolds and Reynolds Business Forms (formerly Jordan Business Forms and Jordan Systems and Forms-operating under common ownership) who work in or are paid from Charlotte, North Carolina; (Revised 2/11/97)

35. Employees of P&M Tile, Inc., who work in or are paid from Lexington, North Carolina; employees of Microfibres South who work in Winston Salem, North Carolina; (Rev. 12/23/94)

36. Employees of Copeland Corporation who work in Shelby, North Carolina; employees of Replacements, Ltd. who work in Greensboro, North Carolina; employees of Alpharma (formerly Barre-National, Inc. - Revised 2/11/97) who work in Lincolnton, North Carolina; (Rev. 7/2/93)

37. Employees of Hello, Inc., who work in Richmond, Virginia;

38. Employees of Commercial Metals Company (CMC), and its wholly-owned subsidiary, and affiliated companies, who work in or are paid from Gastonia, North Carolina; (Rev. 12/23/94)

39. Employees of Dennison Manufacturing Company and CPC International (formerly Best Foods Baking Group-Revised 2/11/97) who work in Gastonia, North Carolina; employees of The Timken Company who work in Iron Station, North Carolina;

40. Employees of The Cookson Company who work in Gastonia, North Carolina; employees of Hollingsworth & Vose Company who work in Floyd, Virginia; employees of The Town of Pulaski, Virginia;

41. Employees of Philips Optical Media Corporation who work in Grover, North Carolina; and employees of Process Systems, Inc., who work in Charlotte, North Carolina;

42. Employees of the Town of Dublin, Virginia; employees of Mecklenburg Cardiovascular Consultants, P.A., who work in Charlotte, North Carolina; employees of Piedmont Triad Airport Authority who work in Greensboro, North Carolina; employees of Grass America, Inc., who work in Kernersville, North Carolina;

43. Employees of Technimark, Inc., who work in or are paid from Asheboro, North Carolina;

44. Employees of The John Plant Company who work in Ramseur, North Carolina; employees of B. B. Walker Company who work in Asheboro, North Carolina;

45. Employees of Apperson Business Forms and American Trutzschler, Inc., who work in Charlotte, North Carolina;

46. Employees of the Center for Creative Leadership who work in or are paid from Greensboro, North Carolina, except those employees who work in Brussels, Belgium;

47. Full-time, management employees of DuPont Electronics who work at the Philips Optical Media Corporation located in Grover, North Carolina;

48. Employees of Plastics Manufacturing, Inc., who work in or are paid from or are supervised from Harrisburg, North Carolina; employees of Henry County Plywood Corporation who work in or are paid from or are supervised from Ridgeway, Virginia; employees of Rowe Corporation and their wholly-owned subsidiaries, (Powell Manufacturing Company, Inc., R. H. Bouligny, Inc., The Bouligny Company, Inc., Wood-Hopkins Contracting Company, and Implement Sales Company, Inc.) who work in or are paid from or are supervised from Charlotte, North Carolina;

49. Employees of Tultex Corporation who work in or are paid from or are supervised from Martinsville, Virginia; employees of Timken Company who work in Asheboro, North Carolina;

50. Employees of Plymouth, Inc., who work in Radford, Virginia;

51. Employees of Oliver Rubber Company who work in Asheboro, North Carolina; employees of KMG Minerals, who work in or are paid from or are super-

vised from Kings Mountain, North Carolina; employees of Covington Diesel, a subsidiary of Geneva Corporation, who work in or are paid from Greensboro, North Carolina;

52. Employees of The Wella Corporation who work in, are paid from or supervised from Richmond, Virginia or Englewood, New Jersey; employees of Chandler Concrete Company, Inc., who work in, are paid from or supervised from Burlington or Greensboro, North Carolina; employees of Multiton Mic Corporation who work in, are paid from or supervised from Richmond, Virginia; employees of The Timken Company who work in, are paid from or supervised from Gaffney, South Carolina or Canton, New Philadelphia, Bucyrus, Columbus or Ashland, Ohio; (Rev. 2/15/94)

53. Employees of Verbatim Corporation who work in or are paid from or are supervised from Charlotte, North Carolina; employees of Microsoft Corporation who work in Charlotte, North Carolina; employees of Fasco Controls Corporation who work in or are paid from or are supervised from Shelby, North Carolina;

54. Employees of Integon Corporation, and its wholly-owned subsidiary, Marketing One, Inc., who work in or are paid from or are supervised from Winston-Salem, North Carolina;

Members of record of the Integon Credit Union as of August 29, 1992;

55. Employees of E. I.du Pont de Nemours & Company, Inc., who work in, or are supervised from, or are paid from Charlotte, North Carolina;

56. Employees of the Better Business Bureau and the Greater Winston-Salem Chamber of Commerce who work in or are paid from or are supervised from

Winston-Salem, North Carolina; employees of Keeter Motors, Inc., who work in or are paid from or are supervised from Shelby, North Carolina; employees of Alemite Corporation and REI/Lundy Systems who work in or are paid from or are supervised from Charlotte, North Carolina; employees of Southwestern Virginia Energy Industries, LTD., who work in or are paid from or are supervised from Martinsville, Virginia;

57. Employees of the following employers who work in, are paid from or supervised from the named locations:

Belmont Hosiery Mills, Inc. - Belmont, North Carolina
Luxfer Gas Cylinders (formerly Luxfer USA Limited - Revised 2/11/97) - Graham, North Carolina
Holt Manufacturing Company, Inc. - Burlington, North Carolina
Xaloy - Pulaski, Virginia
PPG Industries, Inc. - Shelby and Lexington, North Carolina
ESM Corporation - Charlotte, North Carolina

58. Employees of the Coca Cola Bottling Works of Nashville, Tennessee who are paid out of Charlotte, North Carolina;

59. Employees of JPS Textile Group, Inc., and its subsidiaries, ~~JPS Carpet Corp.~~, (Rev. 12/7/95) JPS Converter and Industrial Corp., JPS Automotive Products Corp. and JPS Elastomerics Corp., who work in or are paid from or are supervised from Greenville, South Carolina; employees of Triad Packaging Co., Inc., and Hudson-Industries who work in or

are paid from or are supervised from Richmond, Virginia;

60. Employees of Atlantic Envelope Company and Odell Associates, Inc., who work in or are paid from or are supervised from Charlotte, North Carolina; employees of I R International, Inc., who work in or are paid from or are supervised from Richmond, Virginia; employees of Mayflower Vehicle Systems (formerly Motor Panels, Inc. - Revised 2/11/97) who work in or are paid from or are supervised from Kings Mountain, North Carolina;

61. Employees of Dollinger Corporation who work in or are paid from or are supervised from Richmond, Virginia; employees of EIS Brake Parts, Division of Standard Motor Products, Inc., who work in or are paid from or are supervised from Rural Retreat, Virginia; employees of Lazar Industries East, Inc., who work in or are paid from or are supervised from Staley, North Carolina; (App. 7/26/93)

62. Employees of Pepsi-Cola Bottling Company of Charlotte who work in or are paid from Charlotte, North Carolina; employees of Pluma, Inc., who work in or are paid from Eden, North Carolina; (App. 8/18/93)

63. Employees of the following employers who work in, are paid from or supervised from the stated locations: (App. 9/9/93)

D. P. Solutions, Inc. - Greensboro, North Carolina
J. K. Timmons & Associates - Richmond, Virginia
Schlafhorst, Inc. - Charlotte, North Carolina
Elon College - Elon College, North Carolina

Benchmark Systems of Va. - Mechanicsville, Virginia

64. Employees of the following employers who work in, are paid from or supervised from the stated locations: (App. 10/14/93)

Charlotte Eye, Ear, Nose & Throat Associates - Charlotte, North Carolina
Bondcote Corporation - Pulaski, Virginia
Bassett Mirror Company, Inc. - Bassett, Virginia
Salem Academy and College - Winston-Salem, North Carolina
Guilford College - Greensboro, North Carolina;

65. Employees of the following employers who work in, are paid from or supervised from the stated locations:

Krispy Kreme Doughnuts - Winston-Salem, North Carolina
Mann Travels/Carlson Travel Network - Charlotte, North Carolina
Burlington Chemical Company - Burlington, North Carolina
Electrical Distributors, Inc., - Charlotte, North Carolina
Harris Corporation (formerly Micro Computer Systems - -
(Revised 2/11/97) Greensboro, North Carolina
Sunbeam Outdoor Products - Stanley, North Carolina
(Rev. 12/23/94)
The Dize Company - Winston-Salem, North Carolina
Longwood Elastomers - Wytheville, Virginia
Haworth, Inc. - Lincolnton, North Carolina

AT&T Consumer Products - Charlotte, North Carolina
Family Financial Services, Inc. - Winston-Salem, North Carolina
Allen, Allen, Allen & Allen Law Firm - Richmond, Virginia
CIGNA Medicare and CIGNA Healthcare (a division of
CIGNA- Medicare) - Greensboro, North Carolina (App. 3/8/94 & Rev. 3/7/96)

Members of the North Carolina Junior Chamber of Commerce headquartered in Asheboro, North Carolina, who qualify for membership in accordance with the association's bylaws as they existed on March 8, 1994: employees of the North Carolina Junior Chamber of Commerce who work in Asheboro, North Carolina;(App. 3/8/94)

66. Employees of the following employers who work in, are paid from, or are supervised from the stated locations: (App. 5/18/94)

Scholl America - Gibsonville, North Carolina
Impact Enterprises, Inc., - Greensboro, North Carolina
Smith, Helms, Mulliss & Moore, L.L.P., Attorneys at Law - Greensboro, North Carolina
Stabilus - Gastonia, North Carolina
American Standard Building Systems - Martinsville, Virginia
Ametek, Lamb Electric Division - Graham, North Carolina;

Employees of McEwen Lumber Company headquartered in High Point, North Carolina who work at the following locations: High Point, Charlotte and

Raleigh, North Carolina; Greenville and Charleston, South Carolina; Richmond, Virginia; Atlanta, Georgia; Orlando, Delray Beach, Jacksonville and Tampa, Florida; and Nashville and Memphis, Tennessee; (App. 5/18/94)

Natural person, voting members of the Virginia Trial Lawyers Association, headquartered in Richmond, Virginia, who qualify for membership in accordance with the association's bylaws as they existed on May 18, 1994:

67. Employees of BFI Waste Systems and Southern Health Corporation who work in Richmond, Virginia; employees of FIL International. Inc., who work in or are paid from Greensboro, North Carolina; employees of Gullwing Screenprint who work in Winston-Salem, North Carolina; employees of Queens Group, Inc., who work in or are paid from Stanley, North Carolina; employees of Polo-Ralph Lauren Corporation who work in Greensboro, North Carolina; employees of Shionogi Qualicaps, Inc., who work in Greensboro or Whitsett, North Carolina; employees of Kernodle Clinic who work in or are paid from Burlington, North Carolina; employees of Jobst Institute, Inc., who work in Charlotte, North Carolina; (App. 6/13/94)

68. Employees of Gary Brown & Associates who work in Greensboro, North Carolina; employees of the North Carolina Pest Control Association who work in Monroe, North Carolina; regular members of the North Carolina Pest Control Association located in Monroe, North Carolina who qualify for membership in accordance with its constitution and bylaws in effect on July 6, 1994; (App. 7/6/94)

69. Employees of JPS-Converter & Industrial, Borden Plant, who work in Kingsport, Tennessee; (Merger 7/29/94)

70. Employees of HBO & Company's Charlotte Product Group (formerly First Data Health Systems Group) who work in, are paid from or supervised from Charlotte, North Carolina (Rev. 9/12/95); employees of JPS Automotive Products Corporation who work in, are paid from or are supervised from Greenville, South Carolina or Cramerton, North Carolina; employees of Ametek-Technical Motor Division who work in, are paid from or supervised from Whitsett, North Carolina; (App. 8/8/94)

71. Employees of Hamilton Beach/Proctor Silex who work in Richmond or Glen Allen, Virginia, Southern Pines, Washington or Mt. Airy, North Carolina; employees of UNOS who work in or are paid from Richmond, Virginia; employees of The Ellison Company, Inc., and its divisions, APC Building Products, Specialty Manufacturing Company and Ellison Properties Group who work in or are paid from Greensboro, North Carolina; employees of Lowe's Food Stores, Inc., who work in, are paid from or supervised from Winston-Salem, North Carolina; employees of Franklin Industries, Inc., who work in or are supervised from Kings Mountain, North Carolina; (App. 9/8/94)

72. Employees of Wysong & Miles Company who work in or are paid from Greensboro, North Carolina; employees of Sanders Brothers, Inc., who work in or are paid from Gaffney, South Carolina; (App. 11/21/94)

Employees of tenants who regularly work in the Integon Towers Complex/Chamber Building in Winston-Salem, North Carolina; (App. 11/21/94)

73. Employees of Prillaman Chemical Corporation who work in or are supervised from Martinsville, Virginia; (App. 12/8/94)

74. Employees of Modern Machine & Metal Fabricators who work in or are paid from Kernersville, North Carolina; employees of Kingston-Warren Corporation who work in or are paid from Wytheville, Virginia; (App. 12/23/94)

75. Employees of Merchants Distributors, Inc., and its wholly-owned subsidiary, Institution Food House, Inc., who work in or are paid from Hickory, North Carolina; (Merger 1/6/95)

76. Employees of the following employer groups who work in the townships or named location in North Carolina:

Alamance County
City of Burlington
City of Graham
Town of Haw River
Town of Elon College
Town of Mebane
Town of Gibsonville
Burlington Housing Authority - Burlington, North Carolina
Graham Housing Authority - Graham, North Carolina
Bur-Gra Board of Alcholic Control - Graham, North Carolina
Ala-Caswell Mental Health - Alamance County, North Carolina
Group Homes for Developmentally Disabled Adults in Almance County, North Carolina; (Merger 2/6/95)
Town of Green Level (Rev. 5/23/95)

77. Employees of Ligon Electric Supply Company, Inc., who work in or are paid from Winston-Salem, North Carolina; employees of The Austin Company who work in or are paid from Yadkinville, North Carolina; employees of Charter Greensboro Behavorial Health Systems, Inc., who work in or are paid from Greensboro, North Carolina; (App. 2/10/95)

78. Employees of Pine Hall Brick Company who work in, are paid from or are supervised from Madison, North Carolina; (App. 3/9/95)

79. Employees of Greensboro College who work in, are paid from or are supervised from Greensboro, North Carolina; students enrolled at the named college, limited to a maximum of 2,500 students: (App. 3/9/95 & 6/21/95)

80. Employees of Genetic Design who work in, are paid from or are supervised from Greensboro, North Carolina; (App. 4/10/95)

81. Employees of AT&T Services/Technical Services Companies, Inc., a division of AT&T Corporation, who work in or are paid from or supervised from Greensboro, North Carolina; (App. 5/12/95)

82. Employees of Kysor Carolina Metal Products who work in or are paid from Charlotte, North Carolina; employees of Draper Aden Associates, Inc., who work in or are paid from Blacksburg, Virginia; employees of CIMTEC Automation & Control who work or are paid from Charlotte, North Carolina; (App. 5/12/95)

83. Employees of the following who work in, are paid from, or are supervised from the stated locations: (App. 7/14/95)

Holston Medical Group - Kingsport, Tennessee
Worth Chemical Corporation - Greensboro, North Carolina
BBA Friction, Inc. - Dublin, Virginia
Mount Rogers Community Mental Health and Mental Retardation
Services Board - Wytheville, Virginia
Chemtreat, Inc. - Glen Allen, Virginia
St. Mark's, Inc. - Charlotte, North Carolina
BFI Waste Systems - Charlotte, North Carolina

84. Employees of FlagStar Corporation who work in, are paid from or are supervised from Spartanburg, South Carolina; (App. 8/16/95)

Natural person, homeowner members of the Hidden Creek Homeowners Association, Inc., who qualify for membership in accordance with the association's bylaws as they existed on August 16, 1995, limited to a maximum of 2,500 members; (App. 8/16/95)

Employees of the following employers who work in, are paid from or are supervised from the stated locations: (App. 8/16/95)

Anderson and Associates, Inc., - Blacksburg, Virginia
Datastream Systems, Inc. - Greenville, South Carolina
General Injectables & Vaccines, Inc. - Bastian, Virginia
Holy Angels - Belmont, North Carolina
Virginia Physicians, Inc. and its affiliates: Phycor of Richmond, Inc.,
McGuireMed Group Practice and Family Physicians Limited - Richmond, Virginia;

85. Employees of the following employers who work in, are paid from or are supervised from the stated locations: (App. 9/12/95)

Industrial Truck Sales & Service, Inc. - Greensboro, North Carolina
Wilson-Cook Medical, Inc. - Winston-Salem, North Carolina
Greenfield Industries (formerly Cleveland Twist Drill- Revised 2/11/97) - Asheboro, North Carolina
Charter Behavorial Health System of Winston-Salem - Winston- Salem, North Carolina;

86. Employees of Office Environments, Inc., who work in, are paid from or are supervised from Charlotte, North Carolina; employees of Insurance Company of North America-CIGNA-who work in Richmond, Virginia; members of AT&T Pioneers-Carolinas Chapter 106 in Greensboro, North Carolina, who qualified for membership in accordance with the association's bylaws as they existed on October 16, 1995, limited to a maximum of 2,500 members; (App. 10/16/95 & Rev. 4/11/96)

87. Employees of tenants who regularly work in the Town of Dublin Industrial Park in Dublin, Virginia; employees of Hughes Furniture Industries, Inc., who work in or are paid from Randleman, North Carolina; (App. 11/13/95)

88. Employees of Gulistan Carpet, Inc., (formerly JPS Carpet Corporation) who work in, or are paid from or are supervised from Aberdeen, North Carolina, and its sales representatives who work under a long-term contract with the named corporation and who are supervised from the headquarters location; (App. 12/7/95)

Employees of Great American Knitting Mills, Inc., who work in or are paid from Burlington, North Carolina; (App. 12/7/95)

89. Employees of the following groups who work in, are supervised from, or paid from the stated locations: (App. 3/7/96)

Steelfab - Charlotte, North Carolina
Texfi Industries, Inc. - Raleigh, North Carolina
Waste Management of the Piedmont - Winston-Salem, North Carolina
R. J. Reynolds-Patrick County Memorial Hospital - Stuart, Virginia
Twin County Regional Healthcare, Inc. - Galax, Virginia

90. Employees of Magnox Pulaski, Inc., who work in Pulaski, Virginia; employees of Filtration Group, Inc. (formerly Moldan Corporation) who work in York, South Carolina; (App. 4/11/96)

91. Employees of the following who work in, are paid from or are supervised from the named locations in North Carolina: (App. 5/13/96)

RWM Castors Company - Gastonia
Indera Mills Company - Winston-Salem

92. Employees of National Gypsum Company, who work in or are supervised from the corporate headquarters in Charlotte, North Carolina; Employees of sales offices of the above mentioned company who work in or are supervised from Charlotte, North Carolina; Employees of Binswanger & Company, Inc. (formerly a division of National Gypsum Company) who work in the states of Georgia, North Carolina, South Carolina, and Virginia; (Merger 6/4/96)

93. Employees of the following who work in, are paid from or are supervised from the named locations in North Carolina: (App. 6/21/96)

Easco Aluminum - Burlington
Waste Management of the Carolinas - Gastonia
B&W Metal Fabricators, Inc. - Welcome
Eurotherm Drives - Charlotte
Cookson Fibers, Inc. - Randleman

employees of Winston Placement who regularly work at Lucent Technologies, Inc., in Winston-Salem, North Carolina;

94. Employees of the following who work in, are paid from or are supervised from the named locations: (App. 7/11/96)

Circuit City Stores, Inc. - Richmond, Virginia (excluding Roanoke, Virginia Beach and Barbersville, Virginia stores)
South Fork - Lincolnton, North Carolina
Anilox Roll Company, International - Charlotte, North Carolina;

95. Civilian and military employees of the U.S. Government and active military reservists who work in or are supervised from Alamance, Guilford, Randolph, or Rockingham Counties, North Carolina (except employees of the Internal Revenue Service and U.S. Post Office Departments); (Merger 7/29/96)

Members in good standing as of the date of this amendment of the National Association of Retired Federal Employees, Chapter 211, Greensboro, North Carolina; (Merger 7/29/96)

Employees of the following who work in Greensboro, North Carolina: (Merger 7/29/96)

Greensboro Housing Authority
E.R. Squibb & Sons, Inc. - ConvaTec Division
Drs. Lebauer, Weintraub, Brodie, Patterson & Associates, P.A.;

96. Employees of The New Cherokee Corporation, who work in or are paid from r are supervised from Spindale or Harris, North Carolina and New York, New York, excluding the employees in Sevierville, Tennessee, which are in the field of membership of another credit union; (App. 8/9/96)

97. Groups of persons with occupational common bonds which are located within 25 miles of one of the credit union's service facilities, which have provided a written request for service to the credit union, which do not presently have credit union service available, and which have no more members in the group than the maximum number established by the NCUA Board for additions under this provision: Provided, however, that the National Credit Union Administration may permanently or temporarily revoke the power to add groups under this provision upon a finding, in the Agency's discretion, that permitting additions under this provision are not in the best interests of the credit union, its members, or the National Credit Union Share Insurance Fund; (App. 7/18/94)

98. Spouses of persons who died while within the field of membership of this credit union; employees of this credit union; persons retired as pensioners or annuitants from the above employment; members of their immediate families; organizations of such persons;

99. The Timken Company and
Duke Power Company (App. 9/12/95)."

Any questions on the enclosed amendment form or instructions should be directed to the Division of Insurance in this office.

Sincerely,

H. Allen Carver
Regional Director

DOI/JBF:jf
FCU #07840

CC:PE J. Walker

CERTIFICATION OF RESOLUTION OF BOARD OF DIRECTORS
ADOPTING AMENDMENT OF CHARTER/BYLAWS

WHEREAS, the attached amendment of the credit union's charter is in the best interests of the members and is consistent with Law, all necessary authorizations having been obtained,

NOW, THEREFORE, pursuant to the provisions of the Federal Credit Union Act, the attached amendment of the charter/bylaws of the AT&T Family Federal Credit Union No. 07840 is hereby adopted by the board of directors in accordance with Article XXI of the above Federal Credit Union's Bylaws.

We, the undersigned President and Secretary of the above Federal Credit Union, hereby certify that on _____, 19__, the above resolution amending to the charter/bylaws was adopted by the board of directors in accordance with Article XXI of the above Federal Credit Union's Bylaws.

_____ _____
President Secretary

Nos. 96-843 & 96-847

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
and
AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,
v.
FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

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62 pp

QUESTIONS PRESENTED

1. Whether banks have standing under the Administrative Procedure Act to challenge the National Credit Union Administration's purported misapplication of the common bond provision of the Federal Credit Union Act, 12 U.S.C. § 1759, where the banks' interests are antithetical to the interests that Congress intended to protect through that statutory provision.

2. Whether the policy of the National Credit Union Administration that permits federal credit unions to consist of multiple occupational groups, each with its own common bond, is a permissible interpretation of the statute that Congress entrusted the agency to administer.

PARTIES TO THE PROCEEDING

The National Credit Union Administration was the defendant-appellee below and is the petitioner in No. 96-843 before this Court.

AT&T Family Federal Credit Union ("ATTF") and Credit Union National Association, Inc. ("CUNA")—a trade association of credit unions—were intervenors-appellees below and are the petitioners in No. 96-847 before this Court. Neither ATTF nor CUNA have any parent companies or subsidiaries.

The American Bankers Association, Bankers Trust Company of North Carolina, First National Bank and Trust Company, Lexington State Bank, Piedmont State Bank, and Randolph Bank and Trust Company were plaintiffs-appellants below and are respondents in this Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-843 & 96-847

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

and

AT&T FAMILY FEDERAL CREDIT UNION and
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Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

OPINIONS BELOW

The opinions of the court of appeals on standing and the merits are reported at 988 F.2d 1272 and 90 F.3d 525 respectively, and are reproduced at pages 25a and 1a of the appendix to the petition in No. 96-847 ("Pet. App.") and pages 15a and 1a of the appendix to the petition in No. 96-843 ("NCUA Pet. App."). The opinions of the district court on standing and the merits are reported at 772 F. Supp. 609 and 863 F. Supp. 9 respectively, and are reproduced at Pet. App. 40a, 13a, and NCUA Pet. App. 32a, 43a.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. Petitioners' timely petitions for rehearing and suggestions for rehearing *en banc* were denied on October 23, 1996. Pet. App. 50a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The petitions for a writ of certiorari were filed on November 26 and 27, 1996, and were granted on February 24, 1997. 117 S. Ct. 1079.

PERTINENT STATUTES AND REGULATIONS

Section 1759 of Title 12, U.S.C., and Section 702 of Title 5, U.S.C., are reproduced in an appendix to this brief. The pertinent provisions of the agency ruling at issue are reproduced at Pet. App. 57a-59a.

STATEMENT OF THE CASE

This case involves an attempt by respondents, various banks and their trade association (collectively, the "Banks"), to limit the membership of a federally-chartered credit union, petitioner AT&T Family Federal Credit Union ("ATTF"). The Banks challenged, under the Administrative Procedure Act ("APA"), the approval by the National Credit Union Administration ("NCUA") of certain amendments to ATTF's charter. These amendments had been approved pursuant to NCUA's policy of permitting a federal credit union to consist of multiple groups, provided the individuals in each group share with the other members of that group a "common bond" within the meaning of Section 109 of the Federal Credit Union Act ("FCUA"), 12 U.S.C. § 1759. The Banks contended that NCUA's multiple group policy was inconsistent with the governing statute and therefore invalid.

The district court, in separate rulings, held that the Banks had no standing under the APA to challenge NCUA's purported misapplication of the common bond provision, and that the multiple group policy was a permissible exercise of NCUA's authority. The court of

appeals, however, reversed both rulings. Although that court expressly held that the FCUA and its common bond provision were intended by Congress to promote the growth and viability of credit unions—interests that the court acknowledged are completely antithetical to the competitive interests of the Banks—the court nevertheless conferred standing on the Banks under the APA because they were, in the court's view, "suitable challengers" to vindicate the interests Congress *did* intend to protect. Then, after squarely rejecting the Banks' principal argument on the merits that Section 1759 does not permit multiple groups at all, the court nevertheless held that the statutory language unambiguously requires that all individuals within such multiple groups must have a single common bond.

As explained below, the court of appeals erred on both counts. This Court's "zone of interests" test permits standing under the APA only when a plaintiff's interests are among those that Congress intended to protect or regulate through the statutory provision in question. Yet the competitive interests of the Banks in restricting credit union operations are plainly not among those that Congress intended to protect or regulate through the common bond provision. That provision, like the FCUA itself, was unquestionably intended to protect credit unions and their members, not banks. Likewise, even if the Banks have standing, the court of appeals erred in determining that Congress clearly resolved the precise question presented in this case and therefore that no deference was owed to NCUA's policy.

The net result of both of these decisions has been to thwart the clear intent of Congress. Whereas Congress intended for the FCUA and its common bond provision to promote the rapid growth and financial stability of federal credit unions, the rulings of the court of appeals—if allowed to stand—threaten to devastate credit unions throughout the Nation by denying them the opportunity to achieve the strength and diversity necessary for continued viability. This obstruction of Congress' goals,

although consonant with the competitive interests of the Banks, amply demonstrates why the Banks are not within the zone of interests protected by the common bond provision and why, in any event, the Court should uphold NCUA's policy judgments on how best to administer its own statute.

A. The Federal Credit Union Act

The origins of cooperative credit organizations date to nineteenth century Europe. *See generally* J. Carroll Moody & Gilbert C. Fite, *The Credit Union Movement* 1-25 (1971). In this country, the first credit unions were established under state law in the early part of the twentieth century. *Id.* at 26-52. As would later be the case with the FCUA, a major impetus for these early credit unions was to meet the " 'demand for loans which [was] not being supplied by existing banking institutions,' " and to help eliminate high-rate money lenders—loan sharks. *Id.* at 34, 35 (citation omitted). The first general credit union law was enacted in Massachusetts in 1909, and Congress enacted its first credit union law in 1932, authorizing the establishment of credit unions in the District of Columbia. *See* 1909 Mass. Acts ch. 419; Pub. L. No. 72-190, Ch. 272, 48 Stat. 326 (1932).

The FCUA was enacted in 1934, in the wake of the Great Depression, "to make more available to people of small means credit for provident purposes through a national system of cooperative credit." Pub. L. No. 73-467, Ch. 750, 48 Stat. 1216 (1934) (preamble). The FCUA authorizes the granting of federal charters to credit unions, and defines a credit union as a cooperative organization formed for the purpose of "promoting thrift among its members and creating a source of credit for provident and productive purposes." 12 U.S.C. § 1752 (1). A distinctive attribute of credit unions is that members of the credit union own and control the organization for their mutual benefit. *Id.* § 1757(6). Members purchase shares in the organization with their deposits and vote on such matters as election of directors, with each

member receiving one vote regardless of number of shares. *Id.* §§ 1757(6), 1760. A credit union can make loans and extend credit to its members and to other credit unions, but not to the general public. *Id.* § 1757(5). Credit unions are managed by boards of directors and supervisory committees consisting entirely of credit union members, almost all of whom are unpaid volunteers. *Id.* § 1761. When the FCUA was enacted, credit union shares (deposits) were uninsured, but the law was amended in 1970 to provide for federal insurance. *See id.* §§ 1781-1790c.

The legislative history clearly reveals that the FCUA was intended by Congress to foster the rapid growth of credit unions and to protect their financial stability. Credit unions were intended to "bring normal-credit resources on a cooperative basis to the masses of the people whose buying power is now so often dissipated in high-rate interest charges." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). *See also* H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Congress felt that the "need for much more rapid national development" of credit unions was "very great." S. Rep. No. 555, *supra*, at 3. Noting that there had been no involuntary liquidations of state credit unions during the Depression, Congress believed that the fact that credit unions "have come through the depression without failures, when banks have failed so notably, is a tribute to the worth of cooperative credit and indicates clearly the great potential value of rapid national credit union expansion." *Id.* at 2, 3-4.

There is no evidence whatsoever that Congress enacted any provision of the FCUA—least of all the common bond provision—out of a concern to protect banks from competition with credit unions. Quite to the contrary, Congress saw credit unions as a "happy medium" between loan sharks and banks. 78 Cong. Rec. 7259 (1934) (Sen. Barkley). Banks were perceived as having disdained working people, because many borrowers of small means lacked adequate security or sought funds in amounts too small to justify a bank loan. *Id.* ("[B]ank[s]

* * * cannot extend credit to many of these people, because they do not have the required security"); *id.* at 12,225 (credit unions would serve individuals "who do not use and cannot use banks * * * for small borrowings") (Rep. Luce). Credit unions were intended to allow working people to obtain credit "[w]ithout being subject to the outrageous rates of loan sharks and others who prey upon people of that class." *Id.* at 7259 (Sen. Barkley).

B. The Common Bond Provision And NCUA's Multiple Group Policy

This case centers around the "common bond" provision of Section 109 of the FCUA, which specifies that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. § 1759. NCUA, through its governing Board, is the agency entrusted by Congress to administer the FCUA. *See* 12 U.S.C. §§ 1752a, 1766. Congress authorized NCUA, among other things, to "prescribe rules and regulations for the administration" of the FCUA, *id.* § 1766(a), and specifically authorized the agency to determine whether a federal credit union charter complies with the governing statute. *See id.* § 1754. When Congress created NCUA in 1970, it expressly stated its intent that the agency "provide more flexible and innovative regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1970). NCUA has heeded this direction in implementing the common bond provision, modifying its policy over the years to respond to changes in the national economy and in the economics of federal credit unions. This regulatory evolution evinces the agency's understanding that it must implement the common bond provision in a "pragmatic" fashion, and continually re-evaluate its policy "to reflect changing social, commercial and economic conditions." 45 Fed. Reg. 8282 (1980); 44 Fed. Reg. 43,737 (1979).

Even before the promulgation of the multiple group policy at issue in this case, NCUA had implemented the

common bond provision so as to permit a credit union's membership to include employees of different employers located within the same general geographic area. In 1972, NCUA provided that credit unions could consist of employees of different employers, provided that "as a consequence of their employment and relationship they could be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972). Thus, NCUA expressly permitted credit unions to be formed by employees of multiple employers who worked in the same shopping center, industrial park, building, or airport. *Id.* at 7.

In regulations promulgated in 1980, the agency continued to permit multiple employer groups subject to geographic limitations. Those regulations provided that "[o]ccupational Federal credit unions may be chartered on the basis of a common bond of employment by the same employer, employment in certain related activities in the same general locality, *or employment within a very limited specified area.*" 45 Fed. Reg. 8285 (1980) (emphasis supplied). Thus, pursuant to this policy, an "occupational" credit union could consist of employees of multiple unrelated employers, provided those employers were located in the same area.

In 1982, NCUA adopted the policy that is directly at issue in this case. In Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982), the agency permitted the granting of charters and charter amendments to credit unions that desire to serve multiple occupational groups, provided each of these groups has its own common bond. Two months later, the agency issued IRPS 82-3, which reaffirmed the policy but added the limitation that all the groups be within a "well-defined area." 47 Fed. Reg. 26,808 (1982). NCUA later construed the term "well-defined area" to mean "within a 'well-defined area' of an existing branch" of the credit union. 48 Fed. Reg. 22,899 (1983). In 1989, NCUA further modified this language to require that each group

be within the "operational area of a planned home or branch office," which NCUA defined as "the area surrounding the home or a branch office that can be reasonably served by the applicant * * * as determined by NCUA." IRPS 89-1, 54 Fed. Reg. 31,170 (1989).

Thus, pursuant to this policy, a federal credit union may consist of multiple occupational groups, provided each group has its own common bond and is located in an area that can reasonably be served by the home or a branch office of the credit union. Importantly, however, membership in a credit union remains limited to *groups*: no person may become a member of a credit union unless that person is a member of one of the groups set forth in the credit union's charter approved by NCUA.[1] Unlike a bank, a credit union may not offer its services to any member of the general public.

Moreover, there are stringent limitations on the types of groups that NCUA will approve under its multiple group policy. Each group, of course, must have its own common bond, which must include a geographic definition. *See* 59 Fed. Reg. 29,076 (1994). As NCUA has made clear, not all groups of employees will have the requisite occupational common bond. For example, NCUA will not allow a credit union to include proposed occupational groups consisting of "[e]mployees of engineering firms in Seattle, Washington" or "[p]ersons employed or working in Chicago, Illinois," because although these aggregations are certainly "groups," they lack the requisite common bond. *Id.* Each group in a credit union must individually request inclusion and the credit union must show to the satisfaction of NCUA that it has the financial resources and management capability to provide quality service to each group. *Id.* at 29,078.[2]

[1] Membership may also be extended to the immediate family of a credit union member and to employees of the credit union. *See* 59 Fed. Reg. 29,079 (1994).

[2] The types of "associational" groups that NCUA will approve are likewise generally limited to groups (such as student or church groups) consisting of individuals "who participate in activities developing common loyalties, mutual benefits, and mutual interests." 59 Fed. Reg. 29,076 (1994). Examples of proposed associational groups that NCUA will not approve include "associations formed primarily to obtain a federal credit union charter," and groups consisting of "[v]eterans of U.S. military service," or "[c]ustomers of ABC Insurance Company." *Id.* Again, although these terms certainly define "groups," the members of each of these groups lack the requisite common bond.

When NCUA modified its common bond regulations in 1980, it noted the need to provide greater regulatory flexibility to address "the changes that have taken place in communities, associations, and employer groups." 45 Fed. Reg. 8282 (1980). Likewise, in 1982 Congress acknowledged that "credit unions * * * are forced to adjust to the economic turbulence of a recovery period which has seen a large number of plant closings * * *." S. Rep. No. 536, 97th Cong., 2d Sess. 34 (1982). Thus, when it issued IRPS 82-1, NCUA stated that its multiple group policy was intended "to ensure the continued availability of credit union service." 47 Fed. Reg. 16,775 (1982).

NCUA further explained the rationale for the multiple group policy in an October 28, 1983 letter from NCUA's Chairman to the Chairman of the House Committee on Banking, Finance and Urban Affairs.[3] In that letter, the Chairman explained that the policy was intended to adjust NCUA's regulations "to changing social conditions and to bring credit union services to groups desiring such services but not yet served." J.A. 45. He noted that because the agency's experience had shown that "some groups were too small either by themselves or when grouped together to support a viable credit union," the multiple group policy ensured that a credit union "could serve groups not otherwise eligible for a viable credit

[3] The FCUA provides that "[t]he Chairman of the [NCUA] Board shall be the spokesman for the Board and shall represent the Board and the National Credit Union Administration in its official relations with other branches of the Government." 12 U.S.C. § 1752a(e).

union charter and * * * survive hard economic times." J.A. 44. He also explained that diversification provided protection against economic downturns or restructurings because "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps, whereas a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," thereby furthering Congress' goal of fostering a truly national system of cooperative credit. J.A. 44. As the Chairman stated, the policy reflected "the major changes occurring in smokestack America with an ever increasing number of factories closing down while simultaneously there has been a major increase in industries with less than a hundred people." J.A. 43.

In 1984, NCUA reiterated one of the main reasons for the multiple group policy, noting that:

> The primary intent of the newly expanded field of membership policy and the essential basis for all changes in the policy since April 1982 is to provide credit union services to new groups—to people who do not presently have credit union service available to them. [49 Fed. Reg. 46,537 (1984).]

The policy itself was subsequently reaffirmed in 1989 and in 1994. *See* IRPS 89-1, 54 Fed. Reg. 31,168 (1989); IRPS 94-1, 59 Fed. Reg. 29,066 (1994), *codified at* 12 C.F.R. § 701.1.

Congress has been well aware of NCUA's multiple group policy since shortly after it was promulgated. *See* Pet. App. 22a n.14. In addition to the 1983 letter from NCUA's chairman, NCUA described the multiple group policy in its 1982 Annual Report to Congress, *see* NCUA, 1982 Annual Report 1, the American Bankers Association specifically objected to the policy in testimony submitted to an oversight committee in 1987, *see Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th

Cong., 1st Sess. 1883 (1987), and the General Accounting Office described the policy in a 1991 report to Congress. *See* GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 218-219 (July 1991). Yet in the 15 years that the multiple group policy has been in effect, Congress has never altered NCUA's interpretation of the common bond provision, despite amending the statute on more than a dozen occasions. *See* NCUA Pet. 8-9 n.4.

C. The Proceedings Below

In 1990, eight years after NCUA had issued IRPS 82-1, the Banks brought this APA action against NCUA, challenging NCUA's 1989 and 1990 approvals of certain amendments to ATTF's charter. These amendments, predicated on the multiple group policy, permitted ATTF to expand its field of membership to include various groups of employees largely based in North Carolina and Virginia. The Banks contended that these approvals contravened the statutory common bond provision. ATTF and CUNA were permitted to intervene in support of NCUA.

1. *The Decisions On Standing*

The district court dismissed the action on the ground that the Banks lacked standing under the APA. After noting that "[t]he legislative history of the FCUA makes it clear that the Act was passed to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interests of banks," the court held that "it would defy logic to assume that Congress, in passing the FCUA, wanted to protect the interest of banks." Pet. App. 45a, 46a. Likewise, the court explained that the common bond provision was not intended to protect banks, but rather "was designed to ensure that credit unions remain responsive to those they were designed to serve." *Id.* at 46a. Thus, because "the interests of banks will rarely if ever coincide with those of credit unions," the court held that "commercial banks are not within the zone of interests which Congress in-

tended to protect when it passed the FCUA." *Id.* at 47a. The Banks appealed this decision.

The court of appeals specifically *agreed* with the district court's interpretation of Congress' intent in enacting the FCUA and the common bond provision. The court held that "Congress did not, in 1934, intend to shield banks from competition from credit unions." Pet. App. 30a. To the contrary, the court found this notion "anomalous" because Congress' "general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Id.* Likewise, as did the district court, the court of appeals found that the common bond provision, far from being intended to protect the competitive interests of banks, "was seen [by Congress] as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success." *Id.* at 31a. Accordingly, the court held that banks were *not* among the intended beneficiaries of the FCUA.

Nevertheless, the court of appeals held that the Banks had standing under that court's own "suitable challenger" doctrine, a "more subtle" test (Pet. App. 31a) that accords standing to a party whose interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Hazardous Waste Treatment Council* v. *EPA*, 885 F.2d 918, 922 (D.C. Cir. 1989) (*"HWTC IV"*). The court held that even though the goals of the FCUA and the common bond provision were completely at odds with the competitive interests of banks, their interests were nevertheless sufficiently aligned with those that Congress did intend to benefit. Pet. App. 36a. Accordingly, the court reversed the district court judgment and remanded for further proceedings.[4]

[4] Judge Wald, who had dissented from the court of appeals' original formulation of its "suitable challenger" doctrine, *see HWTC IV*, 885 F.2d at 930 (Wald, C.J., dissenting), only reluctantly concurred in the judgment on standing in this case, noting that the doctrine is "without roots either in Supreme Court law or in the general purposes of standing." Pet. App. 38a (Wald, J., concurring) (footnote omitted). *See also HWTC IV*, 885 F.2d at 930 (court's "rewriting of 'zone of interests' law is * * * fundamentally at odds with Supreme Court * * * precedent") (Wald, C.J., dissenting).

2. The Decisions On The Merits

Following remand, the district court granted summary judgment in favor of petitioners, holding that "NCUA's interpretation of the common-bond provision is a reasonable construction of an ambiguous statute." Pet. App. 24a. The court held that the statutory language is ambiguous, and that "a reasonable reading of the common bond provision is that a credit union may have several groups, each with its own common bond." *Id.* at 19a. After noting that the Banks "have not seriously argued that the interpretation under challenge is unreasonable," the court held that such an argument "would be a daunting task" because "NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions." *Id.* at 23a-24a. The court therefore upheld the challenged agency actions, and the Banks once again appealed.

The court of appeals again reversed, holding that the language of the common bond provision unambiguously precluded NCUA's interpretation. The court, however, expressly rejected the Bank's principal argument on the merits: that the statute prohibits a federal credit union from including more than one occupational group. Rather, the court found that the statutory language—which uses the plural form "groups"—could plausibly be read to permit more than one group in a credit union. Pet. App. 6a-7a. Nevertheless, employing a 1927 dictionary definition that had not been urged by any party, the court held that the language of the statute indicates that all individual members of a credit union must have a single common bond "regardless whether the FCU is composed of

one or of multiple groups." Pet. App. 7a. The court based this conclusion on its analysis that "a common bond is implicit in the term 'group,' " and therefore "if two or more 'occupational groups' can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups." *Id.* at 6a-7a. The court further reasoned that NCUA's policy of permitting multiple unrelated occupational groups is inconsistent with the statutory language governing community-based credit unions, which indicates that groups in different neighborhoods may not form a single credit union. *Id.* at 8a-9a.

Then, to test its "hypothesis" that the statute was unambiguous, *id.* at 9a, the court analyzed its purpose and legislative history. The court concluded that "Congress intended that each FCU be a cohesive association in which the members are known by the officers and by each other," and that "growth on the scale achieved by ATTF is inconsistent with that purpose." *Id.* at 10a. Finally, the court concluded that the legislative history of the FCUA did not "convincingly contradict[]" the court's interpretation of the statutory language. *Id.* at 11a. Accordingly, the court reversed the judgment of the district court and remanded for declaratory and injunctive relief. *Id.* at 12a.[5]

[5] Following the court of appeals' decision on the merits, the American Bankers Association and two other plaintiffs filed a new action in district court against NCUA, seeking a nationwide injunction preventing the addition of new unrelated groups in *any* federal credit union and preventing the addition of any new members to such groups that had previously been approved. *See American Bankers Association* v. *NCUA*, No. 96-CV-2312 (TPJ) (D.D.C. filed October 7, 1996). On October 25 and 31, 1996, the district court granted that relief. On December 24, 1996, the court of appeals stayed, pending resolution of this case, that portion of the district court's injunction that had prohibited credit unions from adding new members to previously approved groups, but not that portion of the injunction that had prohibited the approval of new groups.

The plaintiffs in that new action have also served notice in their complaint that they will seek an order compelling NCUA "to cause all federal credit unions, notwithstanding any contrary past authorization, to reduce their existing membership" in light of the decision below—i.e., to expel members added since 1982 pursuant to the multiple group policy. Amended Complaint for Declaratory and Injunctive Relief, *American Bankers Association* v. *NCUA*, No. 96-CV-2312 (TPJ) (D.D.C. filed November 15, 1996).

SUMMARY OF ARGUMENT

I. The Banks have not carried their burden of demonstrating that they have standing under the APA. A party has standing to challenge agency action only if "the injury he complains of * * * falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990). The Banks, however, have not shown that the common bond provision was in any sense designed to benefit them or to protect the interests they assert; instead, the provision was intended to protect credit unions and their members by incorporating into federal credit unions one of the features Congress attributed with allowing credit unions to emerge from the Great Depression unscathed, while banks failed. The Banks' competitive interests in weakening credit unions are completely at odds with Congress' purposes of encouraging the growth and financial viability of credit unions. The Banks have not shown that Congress sought to protect them from competition with credit unions; to the contrary, the evidence indicates that Congress saw credit unions as generally serving a market that banks disdained.

For these reasons, the Court should also reject the court of appeals' "suitable challenger" doctrine, which accords standing to parties whose interests are concededly not among those Congress intended to protect whenever, in the view of a particular court, the party's interests "coincide" with the protected interests. As this case demonstrates, that doctrine is not only wholly unprincipled but could confer standing on parties whose goals are directly contrary to those that Congress intended to further.

II. In the event the Court reaches the merits—which it should not do—the Court should uphold NCUA's interpretation of the common bond provision. Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court defers to an agency's reasonable interpretation of its statute unless Congress' intent is "clear" as to the "precise question" at issue. *Id.* at 842. Here, Congress' intent is far from clear as to whether the common bond provision permits multiple occupational groups, each with its own common bond. The statute provides that "federal credit union membership" shall be limited to "groups having a common bond." At best from the Banks' perspective, the statute is ambiguous. The use of the plural form "groups" suggests the possibility of multiple groups, and other language in the same provision indicates that "federal credit union membership" refers to membership in a single credit union, indicating that Congress contemplated multiple groups in a single credit union. The Court should reject the court of appeals' alternative reasoning that, because the term "group" itself already implies a common bond, the statute unambiguously provides that each of the multiple groups within a single credit union must share a single common bond. The term "common bond" is not mere surplusage when applied to a single group, as it imparts a degree of cohesiveness otherwise lacking in the looser term "group". That, in any event, is how the agency understands the terms "group" and "common bond," and there is no justification for overturning that understanding.

Nor do the legislative history or purposes of the statute demonstrate that Congress' intent is clear on the permissibility of NCUA's multiple group policy. The sparse legislative history of the common bond provision is ambiguous on that precise question, and NCUA's policy in fact furthers the statute's purpose of ensuring that credit union members are part of a cooperative venture with others similarly situated. For under that policy, a member of an occupational credit union must always be part of a group

that includes the individual's co-workers. For the same reasons, the Court should uphold NCUA's reasonable interpretation of the ambiguous statutory language. The multiple group policy, which was established to adjust NCUA's regulation to changes in the economy, is plainly a reasonable balancing of Congress' goals of encouraging the growth and financial stability of credit unions while ensuring that members remain part of a cooperative venture. Indeed, the severe harms that would befall the national credit union system in the absence of NCUA's policy show both that the policy is reasonable and that the Banks are not within the statute's zone of interests.

ARGUMENT

I. THE BANKS LACK STANDING

A. A Party Has Standing Under The APA Only If Its Interests Are Among Those That Congress Intended To Protect Or Regulate Through The Provision In Question

The Banks brought this action under the APA, which authorizes suits only by persons who have been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), the Court interpreted this language as imposing a prudential standing requirement that limits cases under the APA to those where "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. *Accord, Bennett* v. *Spear*, 117 S. Ct. 1154, 1161, 1167 (1997). Thus, "to be 'adversely affected or aggrieved * * * within the meaning' of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *National Wildlife Federation*, 497 U.S. at 883 (emphasis

in original). *Accord, Bennett*, 117 S. Ct. at 1167; *Air Courier Conference of America* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 (1991). As this Court has made clear, this statutory inquiry is separate from constitutional requirements: not all prospective plaintiffs who satisfy the "injury-in-fact" and other requirements of Article III will be accorded APA standing. *See Air Courier*, 498 U.S. at 524. As plaintiffs, the Banks bear the burden of proving that they have standing under the zone of interests test. *See id.* at 523 (plaintiffs "must show that they are within the zone of interests sought to be protected"); *National Wildlife Federation*, 497 U.S. at 883 (plaintiff bears burden of proving prudential standing).

The Court has stressed on numerous occasions that the zone of interests analysis turns exclusively on the intent of Congress in enacting the statute in question. As the Court explained in *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987), "[t]he essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Id.* at 399 (quoting *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984)). Thus, "at bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." *Clarke*, 479 U.S. at 400. *See also id.* at 394 (*Data Processing* decision "was basically one of interpreting congressional intent"); *INS* v. *Legalization Assistance Project of the Los Angeles County Federation of Labor*, 510 U.S. 1301, 1305 (1993) (granting stay of district court decision allowing standing where there was "no indication that [the statutory provision] was in any way addressed to [the plaintiffs'] interests") (O'Connor, J., in chambers); *Barlow* v. *Collins*, 397 U.S. 159, 164 (1970) (upholding standing because "[i]mplicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of [the plaintiffs]").

Although the zone of interests test "is not meant to be especially demanding," *Clarke*, 479 U.S. at 399, it does impose substantial limits on the ability of private plaintiffs to invoke the power of the judiciary against the executive branch. In particular, "[i]n cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399-400.

For example, in *National Wildlife Federation, supra*, the Court postulated the following circumstance in which a plaintiff would lack standing under the APA:

> [T]he failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute. [497 U.S. at 883.]

And in *Air Courier*, the Court denied standing to a postal union that sought to challenge agency action permitting certain private mail service allegedly in violation of a statute generally barring the private carriage of mail. Although expansion of such service certainly adversely affected the union's interests by diverting business from the union's employer, the Court found no evidence that the union's interests were among those Congress intended to protect through the statute.

B. The Interests Of The Banks Are Directly Antithetical To The Interests Congress Intended To Protect Through The FCUA And The Common Bond Provision

The Banks have not come close to carrying their burden of proving that their interests are within the zone of

interests that Congress intended to protect through the common bond provision. The Banks have invoked their position as "competitors" of credit unions as the sole basis for allowing them to challenge NCUAA's application of the common bond provision. Yet the Banks' argument in favor of their standing is even less credible than that of the reporting company hypothesized in *National Wildlife Federation*. For the competitive interests of Banks are not merely unrelated to the interests that Congress sought to protect or regulate through the FCUA and its common bond provision; the Banks' interests in weakening credit unions are in fact completely antithetical to Congress' avowed goals of encouraging their rapid growth and continued viability. Accordingly, the competitive interests of the Banks are so "inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399.

1. There can be little dispute as to Congress' intent in enacting the FCUA. As noted above (*see supra* at 5-6), Congress intended the FCUA to foster the rapid development of a national system of credit unions at a time when the Nation's financial system was in shambles following the Great Depression. Congress enacted the FCUA to foster the "rapid national development" of credit unions, which Congress believed was being hampered by restrictive or non-existent state chartering laws. S. Rep. No. 555, *supra*, at 3. *See also id.* at 4 (Congress noted the "great potential value of rapid national credit union expansion"); 78 Cong. Rec. 7259-60 (1934) (Sen. Sheppard); *id.* at 12,225 (Rep. Patman). Congress also believed that national credit unions were vital to the Nation's economy because "industrial recovery depends on the buying power of the masses." S. Rep. No. 555, *supra*, at 1.

The common bond provision was intended to further these same purposes. *See Bennett*, 117 S.S. Ct. at 1167 (whether a plaintiff's interest is within zone of interests

"is to be determined not by reference to the overall purpose of the Act in question * * * but by reference to the particular provision of law upon which the plaintiff relies"). The various limitations on the membership, activities, and practices of credit unions that Congress wrote into the FCUA were seen as important safeguards of their financial stability. Congress was plainly impressed by the fact that state credit unions, "managed by fellow workers," had weathered the Great Depression without a single involuntary liquidation, a fact that Congress attributed to their "exceptional" record for "honest management." S. Rep. No. 555, *supra*, at 3-4, 2. Congress stressed that "self-managed" credit unions had allowed their members "with their own money and under their own management to take care of their own short-term-credit problems at a normal interest rate." *Id.* at 2. Congress further believed that credit unions would be "incapable of exploitation" in part "because of the limitations contained in the law." *Id.* at 3. *See also* 78 Cong. Rec. 7261 (1934) (credit unions are based on the "supposition that the brotherhood of man is a good business principle"). The common bond provision—together with the provisions requiring credit unions to be managed by and for their members—were intended by Congress as a means of strengthening federal credit unions and protecting them from the threat of insolvency or financial instability. This understanding was shared by early credit union organizers as well. *See generally* Jerry Burns, *Origin of the Term "Common Bond" in Credit Union Usage: A Progress Report* (CUNA, March 1979).[6]

There is no evidence that Congress, in enacting the FCUA, was at all concerned with the competitive inter-

[6] Although some early credit union laws did not have any common bond provisions (*see, e.g.*, 1909 Mass. Acts ch. 419), the concept appeared in this country at least as early as 1914 (*see* Burns, *supra*, at 9), and by 1929 a number of states had enacted credit union statutes with common bond provisions. *See, e.g.*, Act Providing for Organization of Credit Unions in State of Missouri, § 5 (1929); 1929 Mont. Laws 105, § 9; 1929 Ariz. Sess. Laws 58, § 6.

ests of banks. The language of the statute, of course, is the most reliable indicator of Congress' intent, and it says nothing whatever about banks or competition. *See, e.g., Air Courier*, 498 U.S. at 524-525 ("The particular language of the statutes provides no support for respondents' assertion that Congress intended to protect jobs with the Postal Service."). Nor does the legislative history evince any concern for the interests of banks. Rather, as noted above (*see supra* at 5-6), precisely the opposite was true. Congress saw credit unions as a "happy medium between the loan shark and the bank." 78 Cong. Rec. 7259 (1934) (Sen. Barkley). Congress believed that potential credit union members had been disdained by banks, "which cannot extend credit to many of these people, because they do not have the required security." *Id.* Credit unions were therefore intended in part to serve individuals "who do not use and cannot use banks * * * for small borrowings." *Id.* at 12,225 (Rep. Luce). *See also id.* at 12,224 (credit unions "are not comparable" to banks) (Rep. Steagall).

In the absence of a national credit union law, Congress believed that these individuals would be left to the mercy of loan sharks or without access to any credit whatsoever. *See id.* at 7259 ("credit unions, nationally extended, will close the great gap in the credit structure, a gap which leaves men and women of small means * * * largely at the mercy of usurious money lenders") (Sen. Sheppard); *id.* at 12,224 (growth of credit unions "has been a battle between the men on the one hand who have taken interest in their fellows, and the loan sharks on the other") (Rep. Luce).[7] There is no indication that commercial banks or banking interests opposed the FCUA or had any role in influencing the drafting of the common bond provision.

[7] Similar notions were expressed during consideration of the earlier District of Columbia Credit Union Act, upon which the FCUA was modeled. *See Incorporation of Credit Unions: Hearings Before the Committee on the District of Columbia on S. 1159*, 72d Cong., 1st Sess. 14 (1932) (testimony that credit unions would be beneficial alternatives to "loan sharks" who were "charging exorbitant interest rates"); *id.* at 28 (credit unions would "bring out savings and concentrate savings in credit unions that would not, otherwise, find the banks") (Sen. Gore).

In the face of this evidence of Congress' intent, it is not surprising that every court to have addressed the issue —including the court of appeals in this case—has held that the purpose of the common bond provision was to protect credit unions and their members, not to protect banks (or, for that matter, loan sharks) from competition with credit unions. As the court of appeals explained, rejecting the Banks' argument to the contrary, banks "were not intended beneficiaries of the FCUA" because

> Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained. [Pet. App. 26a, 30a.]

See also id. at 31a ("we find no indication that Congress was, at that earlier time, concerned about the competitive position of banks").

The court of appeals recognized that the common bond provision was not designed to protect the competitive interests of banks but rather, together with the requirement that credit unions extend loans only to members, was intended to "ensure that credit unions would effectively meet *members'* borrowing needs." *Id.* (emphasis supplied). According to the court, Congress assumed that "a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default," thereby allowing credit unions to "'loan on character.'" *Id.* (quoting 78 Cong. Rec. 12,223 (1934) (Rep. Luce)). Thus, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to *credit unions'* continued success."

Id. (emphasis supplied). *See also id.* at 15a-16a (district court holding that the common bond provision was intended "to insure the financial stability of credit unions by providing a sense of cohesiveness among members and by enabling the members to establish a borrower's credit worthiness at minimum cost; and to promote the growth of credit unions because it was faster and easier to form a credit union with members who already had a common bond").

Other courts have reached the same conclusions with respect to the FCUA and state statutes containing similar provisions. As the Fourth Circuit held in *Branch Bank and Trust Co.* v. *National Credit Union Administration Board*, 786 F.2d 621, 626 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987), "[c]onsistent with the general goals of the statute, the common bond provision was designed to ensure the cohesive operation of credit unions rather than to limit their reach in an effort to protect banks." [8]

The interests of credit unions and their members—not those of banks—were the interests Congress intended to protect through the common bond provision. This is not a case where the FCUA or the common bond provision reflected any "hard-fought compromises" between the in-

[8] *See also Barany v. Buller*, 670 F.2d 726, 734 (7th Cir. 1982) ("The salient feature of credit unions is their democratic control and management, which are buttressed, in part, by the Act's * * * limitation of membership to groups with a common bond."); *Minnesota League of Credit Unions* v. *Minnesota Department of Commerce*, 467 N.W.2d 42, 46 (Minn. Ct. App. 1991) ("The purpose of the common bond requirement is to assure the credit union's interest will be unified, cohesive, and first in the minds and purposes of the credit union's management."), *aff'd*, 486 N.W.2d 399 (Minn. 1992); *Casazza* v. *Department of Commerce*, 350 N.W.2d 855, 859 (Mich. Ct. App. 1984) ("We do not interpret the current credit union statute as being designed to curtail possible competition by the credit unions with the banking and savings and loan institutions. We view the intent of the Michigan credit union statute to be to encourage growth of credit unions and increases in membership.").

terests of putative credit unions and the competitive interests of banks. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). Banks were simply not in the picture; indeed, that fact was the very reason prompting Congress to act.

2. Given that Congress plainly intended the common bond provision to serve the interests of credit unions and their members and did not intend in any way to protect or regulate the competitive interests of banks, it necessarily follows that banks are not within the "zone of interests" of the statute and therefore lack standing to challenge what they perceive to be NCUA's misapplication of the common bond provision. *See Branch Bank*, 786 F.2d at 626 ("If the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue. The banks, by virtue of the statute, simply do not occupy a similar position."). The competitive interests of the Banks in weakening credit unions are completely at odds with Congress' intent to strengthen credit unions and encourage the rapid development of a national credit union system. If the "zone of interests" test is to have any limits at all, it must surely prohibit standing in a case such as this, where the interests the plaintiffs seek to vindicate are not simply beside the point—as with the hypothetical reporting company in *National Wildlife Federation*—but in fact diametrically opposed to the interests Congress intended to protect.

Such a result is supported by this Court's most recent decisions applying the zone of interests test. In *Air Courier*, the Court held that postal workers lacked standing to challenge an administrative decision under the Postal Express Statutes ("PES") opening certain mail delivery services to private firms. The Court explained that to determine standing "[w]e must inquire * * * as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." 498 U.S.

at 524. The Court then denied standing because the statutes reflected no intent to benefit the employment interests of postal workers, even though the statutes had been intended in part to protect those workers' employer —the Postal Service—from private competition. *Id.* at 528.

Likewise, in *Bennett*, this Court recently concluded that ranchers who alleged that they would lose water as a result of an administrative decision made pursuant to the Endangered Species Act had standing under the APA to challenge that decision as violative of a statute requiring that the agency's decisions be based on " 'the best scientific and commercial data available.' " *Bennett*, 117 S. Ct. at 1168 (quoting 16 U.S.C. § 1536(a)(2)). Examining Congress' intent in enacting that provision, the Court held that one of its purposes (if not its primary purpose) was "to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" and that the provision was "intended, at least in part, to prevent uneconomic (because erroneous) * * * determinations." *Id.* Accordingly, the Court held that the ranchers' "claim that they are victims of such a mistake is plainly within the zone of interests that the provision protects." *Id.*

As in all the Court's other decisions upholding standing, the plaintiffs in *Bennett* had standing because their economic interests were among those that Congress specifically intended to protect through the statutory provision they sought to enforce. In this case, by contrast, there is no indication that the Banks' competitive interests were an "explicit concern" of the common bond provision, *id.*, and every indication that they were not.

3. This is therefore not a case where Congress has evinced an intent to regulate competition through a particular statute, thereby according standing to a competitor of the regulated entity. For example, in *Data Processing* the Court held that competitors of banks had standing to challenge agency actions because "Congress had arguably

legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 620 (1971) ("*ICI*") (citing *Data Processing*, 397 U.S. at 157). *See also Bennett*, 117 S. Ct. at 1167 (*Data Processing* plaintiffs were accorded standing because "their commercial interest was sought to be protected by the *anti-competition limitation* contained in § 4 of the [Bank Service Corporation Act]") (emphasis supplied). Likewise, in *ICI* the Court held that competitors of banks had standing to challenge an administrative decision as violative of the Glass-Steagall Act because "Congress did legislate against the competition that the petitioners challenge." 401 U.S. at 621. *Accord*, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970). And in *Clarke*, the Court held that the statute in question was intended by Congress "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," and therefore that the banks' competitors were within the zone of interests protected by that statute. 479 U.S. at 403.

This case, by contrast, does not involve an "entry restricting" statute that was intended to limit the competitive reach of regulated firms. The FCUA and its common bond provision were not intended to limit the competitive reach of credit unions but rather were intended to protect the credit unions and their members. The problem, as Congress saw it, was not that credit unions might compete with banks for the business of working people, but that *no* entity was providing service to these individuals. Facilitating such service—not limiting competition—was Congress' concern in enacting the FCUA.

Nor is there any indication that Congress believed that the common bond provision would restrict the ability of credit unions to compete with banks or that such a restriction on competition was necessary in order to achieve some greater end. *Cf. Clarke*, 479 U.S. at 398 (in *ICI*, "it was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, *had forbidden banks to compete* with

plaintiffs by entering the investment company business") (emphasis supplied). Indeed, if Congress had truly been concerned about restricting the ability of credit unions to compete with banks, the common bond provision would not have been its chosen mechanism. For even under the Banks' restrictive interpretation of that provision, the statute would permit the formation of large, nationwide credit unions with thousands of members (such as those serving members of the military or employees of large companies) that would be formidable competitors to any bank that desired to offer the same financial services.[9]

As this Court's cases make clear, the lack of any evidence that the Banks' interests were among those that Congress intended to protect or regulate through the common bond provision conclusively demonstrates that they are not within the zone of interests protected by that provision and therefore lack standing to pursue this action. But even if the Court were to conclude that Congress' precise intent in enacting the common bond provision is unclear, it is the *Banks* who bear the burden of demonstrating that their interests are among those that Congress intended to pro-

[9] There is in fact no indication that NCUA's interpretation of the common bond provision has caused the credit union movement to become a significant competitor to the banking industry. Even though NCUA's multiple group policy has been in effect for nearly 15 years, the relative market shares of banks and credit unions, as measured by percentages of total household financial assets managed, were the same in 1995 as in 1980, with credit unions having a mere 2% of the market. *See* Affidavit of Keith Peterson ¶ 3, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 *et al.* (D.C. Cir.) (filed Mar. 6, 1997). And during that period, credit unions' share of the market for consumer installment credit (a principal activity of credit unions) actually *fell* from 13% to 12%, while the share of banks rose from 50% to 57%. *Id.* ¶ 8. As of June 1996, the total assets of federally insured banks were more than 15 times larger than those of federal credit unions and more than 30 times larger than those of federal credit unions containing multiple groups. *See* Affidavit of Wayne Winegarden ¶ 5 (Oct. 23, 1996) (R. 94); Second Declaration of David M. Marquis ¶ 5, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 *et al.* (D.C. Cir.) (filed Dec. 11, 1996) ("Second Marquis Decl.").

tect through that statute; petitioners do not have to prove the opposite. *See supra* at 18. Because the Banks have failed to carry that burden, their challenge must be rejected.[10]

C. The Court Of Appeals' "Suitable Challenger" Doctrine Is An Unprincipled And Unwarranted Extension Of This Court's Prudential Standing Jurisprudence

As noted, the court of appeals fully endorsed petitioners' and the district court's understanding of the intent of the FCUA and the common bond provision. Yet the court still conferred standing on the Banks under its "suitable challenger" doctrine—an alternative route to standing created by that court for parties whose interests Congress concededly did not intend to protect or regulate. Under that doctrine, which the court of appeals described as "subtle" and "devilishly complex" (Pet. App. 31a, 37a), such a plaintiff will nevertheless be accorded standing under the APA if its interests, in the court's view, coincide "systematically, not fortuitously * * * with the interests of those whom Congress intended to protect." *HWTC IV*, 885 F.2d at 924. The court held that the Banks had standing under this doctrine because even though the goals of the FCUA and the common bond provision were completely at odds with the competitive interests of the Banks, "[t]here is * * * a reason to think

[10] In *Community First Bank* v. *NCUA*, 41 F.3d 1050 (6th Cir. 1994), the Sixth Circuit conferred standing on banks to challenge NCUA's interpretation of the common bond provision because "[r]efusing to allow competitor banks to challenge credit union expansion might preclude any challenge to an excessively risky credit union expansion." *Id.* at 1054. Not only is this assertion wrong as a factual matter, *see Casazza*, 350 N.W.2d 855 (credit union members brought suit to challenge alleged misapplication of state law common bond requirement), but it squarely conflicts with this Court's unambiguous holdings, *see, e.g.*, *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974) ("[t]he assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing").

that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end." Pet. App. 36a.

As noted above, there is no evidence that the common bond provision was intended as a "statutory picket line" separating credit unions from banks, or that Congress viewed the provision as a "constraint on competition" serving some other end. Congress was simply unconcerned with the competitive situation of banks. Yet the court of appeals nevertheless found standing, demonstrating that its suitable challenger doctrine has no basis in this Court's zone of interests jurisprudence and, if accepted, would virtually eliminate any effective limitations on the standing of private plaintiffs to challenge agency actions.

The court of appeals purported to find support for its doctrine in a single footnote in this Court's opinion in *Clarke*, which explained that the zone of interests inquiry "seeks to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12. *See* Pet. App. 30a; *HWTC IV*, 885 F.2d at 922. But this Court's opinion in *Clarke* makes quite clear that this footnote was merely describing the effect of the zone of interests analysis—which "at bottom * * * turns on congressional intent," *Clarke*, 479 U.S. at 400—and was not creating an alternative route to standing. Thus, after concluding in *Air Courier* that the postal workers lacked standing under its traditional inquiry into Congress' intent, the Court did not go on to analyze whether the workers—although their interests were not among those Congress intended to protect—nevertheless possessed some characteristic that made them "suitable challengers" of the agency interpretation diverting work from their employer.

The court of appeals' decision in this case demonstrates the limitless malleability of this doctrine. If the court was able to conclude that parties whose interests are

diametrically opposed to those that Congress intended to protect are nevertheless "suitable challengers" of agency action, then it is difficult to conceive of many situations in which a plaintiff would be denied standing. Indeed, in the hypothetical envisioned by the Court in *National Wildlife Federation*—in which a reporting service sought to challenge an agency's failure to follow an "on the record" requirement—the reporting service would be a more suitable challenger than the Banks are here. For unlike in this case, the interests of the reporting service would be directly aligned with the interests Congress sought to further, and there would be no indication that the plaintiff might seek to advance goals at odds with those of Congress. Denying standing to the Banks, who seek to weaken credit unions rather than ensure their continued strength as Congress intended, would in fact further the goal of "exclud[ing] those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke*, 479 U.S. at 397 n.12.[11]

Moreover, adoption of a test akin to that applied by the court of appeals would allow judges to supplant Congress' intent with the judges' own subjective views about the "suitability" of particular plaintiffs. Unlike this Court's focus on the intent of Congress, the test applied by the court of appeals contains no effective standards to govern its application.[12]

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[11] The court of appeals believed that the Banks were suitable challengers because "when the plaintiff seeks to enforce a statutory restriction on his competition—a restriction the plaintiff enjoys as well as the statutory beneficiaries—there is a good deal less risk that recognizing the plaintiff's standing will lead to a misdirection of the statutory scheme." Pet. App. 37a. The Banks, however, do not "enjoy" the protections of the common bond provision in the same manner as credit union members, and this case demonstrates the serious risk that according them standing will in fact lead to a "misdirection of the statutory scheme."

[12] As then-Chief Judge Wald explained in dissenting from the court of appeals' initial formulation of its suitable challenger doctrine, the doctrine requires "profound judgments about the overall suitability of diverse organizations or sprawling multinational cor-

The zone of interests test furthers important separation of powers concerns. "Like their constitutional counterparts," prudential standing principles "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society' * * *." *Bennett*, 117 S. Ct. at 1161 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)). *See also Branch Bank*, 786 F.2d at 624 ("A test requiring only injury in fact—the constitutional minimum—would necessarily obstruct and undermine legislative control and guidance over essentially political issues by conferring standing to litigate on a host of parties whose interests Congress failed to protect."). Where, as here, Congress did not intend to protect the interests of a particular plaintiff against agency action, it is not the function of courts to intrude upon the relationship between the legislative and executive branches by nevertheless seeking to vindicate those interests.

If the Banks desire protection from competition with credit unions, they are free to seek that protection from Congress. But Congress did not provide such protection in the FCUA, and this Court may not act to protect the Banks where Congress has not. *Id.* at 626. As the Court explained recently in *Bennett*, 117 S. Ct. at 1162, "Congress legislates against the background of our prudential standing doctrine," and there is no reason to alter that doctrine by conferring standing on those regarded by the courts—but not Congress—as "suitable challengers" of agency action.

II. NCUA'S MULTIPLE GROUP POLICY IS A REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE

Even if the Court were to hold that the Banks have standing, their action should still be dismissed. Contrary

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porations to challenge regulatory schemes, insisting we weigh the various ways in which the entity's interests are internally inconsistent or conflict with other groups who would be within the zone of interests. This is not an appropriate task for the courts." *HWTC IV*, 885 F.2d at 933 (Wald, C.J., dissenting).

to the holding of the court of appeals, Congress has not clearly resolved the question at issue and the Court should therefore defer to NCUA's reasonable interpretation of the statute Congress entrusted it to administer.

This inquiry is governed by the well-settled standards set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under those standards, when a court is asked to consider an expert agency's interpretation of a statute that Congress has entrusted it to administer, the Court must "inquire first whether 'the intent of Congress is clear' as to 'the precise question at issue.' " *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995) (quoting *Chevron*, 467 U.S. at 842). If so, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843. But " 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [the court will] give the administrator's judgment 'controlling weight.' " *NationsBank*, 115 S. Ct. at 813-814 (quoting *Chevron*, 467 U.S. at 843, 844). *See also Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2416 (1995) (agency interpretation upheld where "Congress did not unambiguously manifest its intent to adopt [the plaintiffs'] view").

In this case, as explained below, the intent of Congress is not "clear" and "unambiguous" with respect to the "precise question at issue"—whether a federal credit union may consist of multiple occupational groups, each with its own common bond. Accordingly, NCUA's reasonable interpretation of that provision should be upheld.

A. The Statutory Language Permits Credit Unions Consisting Of Multiple Groups

The statute in question, 12 U.S.C. § 1759, provides in pertinent part that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The most that can be said about this language from the Banks' perspective is that it is ambiguous as to the question presented by this case. *See, e.g., Good Samaritan Hospital* v. *Shalala*, 508 U.S. 402, 417 (1993) (statute is ambiguous if there is more than one "plausible" construction); *Sullivan* v. *Everhart*, 494 U.S. 83, 89 (1990) (statutory language does not resolve precise question where there is more than one "possible interpretation"). The statute provides that credit union membership shall be limited to "groups," in the plural, not "a group," indicating that membership in a credit union may consist of multiple occupational groups. Had Congress wished unambiguously to provide that each credit union must consist of a single group with a single common bond, it could have provided that "membership in *each* federal credit union shall be limited to *a* group having a common bond." Congress did not do so, and its intent is therefore not "clear" with respect to the "precise question" raised by the Banks.

In fact, the remainder of Section 1759 indicates that Congress affirmatively intended for credit unions to consist of multiple occupational groups. Congress used the identical term "Federal credit union membership" at two points in the statute. Congress first provided that "Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations * * * as may be elected to membership and as such shall each, subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by *the* board of directors." 12 U.S.C. § 1759 (emphasis supplied). The singular pronoun "its" refers to the term "Federal credit union,"

demonstrating that "Federal credit union membership" was plainly intended to mean membership in a *single* credit union, a reading confirmed by the use of the singular term "*the* board of directors." Thus, when Congress used the identical term "Federal credit union membership" later in the same sentence in the common bond provision, it must be presumed that Congress was likewise referring to membership in a *single* credit union, which Congress then provided may have multiple "groups." *See Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (it is ordinarily presumed that "identical terms within an Act bear the same meaning").

In the court of appeals, the Banks argued that the statute's use of the singular term "*a* common bond" manifests Congress' unambiguous intent that members of each credit union must have a single common bond. The court of appeals swiftly, and correctly, dispatched this argument, noting that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in an FCU * * *." Pet. App. 6a. For example, the hypothetical phrase "standing shall be limited to persons having an injury-in-fact" does not mean that each person must share the same injury. Likewise, the phrase "league membership shall be limited to teams having a common uniform color" does not mandate that every team in the league must have the same color uniform. *See* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise, * * * words importing the singular include and apply to several persons, parties or things").

B. The Statutory Language Does Not Unambiguously Provide That All Groups In A Single Credit Union Must Share One Common Bond

Having correctly held that the statute can reasonably be interpreted as permitting a credit union to consist of multiple occupational groups, the court of appeals should have concluded that the statute was ambiguous on the "precise question" presented by this case and therefore that

NCUA's multiple group policy was entitled to deference under *Chevron*. *See K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988) ("If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute."). Yet the court, adopting a novel analysis that had not even been urged by the Banks—itself strong evidence that the meaning was not as plain as the court supposed—held that the statute unambiguously provides that where a credit union consists of multiple groups, there must be a single common bond extending across all the groups.

Relying on a dictionary definition of the term "group" as an "assemblage * * * having some resemblance or common characteristic," Pet. App. 6a (ellipsis in original), the court reasoned that:

> By this definition, a common bond is implicit in the term "group." Therefore, if two or more "occupational groups" can be said to have a common bond, it must be because there is a characteristic common to each and every member of the several groups. [*Id.* at 6a-7a.]

As the court further explained, "[i]f the members of a group are by definition bonded, then it is tautological to say that a single group has a common bond; but if multiple groups are said to have a common bond, then there is no tautology—the members of each group share the same bond as the members of the other groups." *Id.* at 7a.

There are numerous fatal flaws in the court's *sua sponte* analysis. First, even the definition of "group" relied on by the court does not implicitly include the notion of a common *bond*. That definition of a group as an "assemblage * * * having some resemblance or common characteristic" imparts only a minimal degree of commonality. Elsewhere in its opinion, the court of appeals correctly recognized that the common bond provision was designed to be the "cement that united credit union members in a cooperative venture." Pet. App. 31a. This degree of cohesiveness is nowhere implied in the definition of "group" chosen by the court. A "resemblance" or a "common characteristic" is not the same as a common "bond." All employees in the Nation share the common characteristic of working for some employer, but they have no common "bond" that would unite them in a cooperative venture.

But just as importantly, the court conceded that the term "common bond" as applied to the membership of a single group, although in the court's view tautological, might have "reflected ordinary usage in 1934." *Id.* at 7a. In fact, "ordinary usage" both in 1934 and today refutes the court's analysis. In the same dictionary the court relied on to locate its alleged tautology, the term "group" is also defined merely as "[a]n assemblage of persons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as a *group* of trees or of islands." *Webster's New International Dictionary* 955 (1927). This definition—the first general definition of "group" in the dictionary, appearing *before* the one cited by the court below, *see id.*—is quite different from the one relied on by the court of appeals in that it lacks the very element of commonality that the court believed was necessarily implicit in the term "group." Under this definition, individuals could constitute a "group" merely because of their comparative segregation from others and need not possess any commonality aside from that perhaps happenstance segregation. If Congress used the term "group" consistent with this meaning, the addition of the term "common bond" is not tautological at all, but rather imparts a notion of cohesiveness and commonality that is otherwise lacking. For example, people waiting at a stoplight constitute a discernible "group," but we would not in common parlance refer to them as sharing a common *bond*.

Indeed, NCUA interprets the term "group" in just such a manner: its regulations list several examples of occupational or associational "groups"—such as "persons employed or working in Chicago, Illinois"—that nevertheless

lack the requisite common bond. *See supra* at 8.[18] And even if the term group were considered to encompass *some* sort of common bond, the latter term is by no means surplusage when one considers that Congress did not want credit unions to include groups with *any* common bond, but rather only groups having a common bond "of occupation or association." 12 U.S.C. § 1759. Contrary to the court of appeals' reasoning, the statute would not have imparted the same meaning if Congress had limited federal credit union membership to "occupational groups." Pet. App. 7a. For as NCUA itself has explained, there are many "occupational groups" that have no common bond. 59 Fed. Reg. 29,076 (1994).

Thus, even if the court of appeals were correct that one meaning of the term "group" implicitly carries with it the notion of a common bond, the existence of a plausible alternative meaning precludes a finding that the statute is unambiguous under *Chevron*. This was the precise holding in *National Railroad Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407 (1992). In that case the agency had interpreted the word "required" broadly, to encompass the meaning "useful and appropriate," but the court of appeals had rejected that interpretation. This Court reversed. It noted that Webster's Dictionary contained alternative definitions of the word, each of which made some sense as used in the statute and one of which supported the agency's interpretation. The Court held that this fact indicated that the statute was "open to interpretation," mandating deference to the agency's view. *Id.* at 418. Here, as well, the existence of an alternative definition of

[18] Members of this Court, as well, have employed a similar syntax implying that the term "organization"—like the term group—does not necessarily include the notion of a common bond. *See New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 19 (1988) (O'Connor & Kennedy, JJ., concurring) ("[T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond.").

the term "group" that supports NCUA's view renders the statute "open to interpretation" and requires that deference be paid to the agency's construction.

Indeed, Congress has shown in another statute that the phrase "groups having a common bond" does not necessarily refer to a single bond that unites the various groups. In 1936, only two years after it enacted the FCUA, Congress enacted a statute under which certain benefits otherwise available only to recognized Indian tribes were extended to groups of Indians in Alaska. That law, which was plainly modeled on the common bond provision of the FCUA, provides that:

> [G]*roups* of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but *having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district*, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans * * *. [25 U.S.C. § 473a (emphasis supplied).]

Under this language, the "common bond" plainly refers to a separate common bond for each of the "groups" of Indians that are to be treated as separate tribes. This later statute, of course, can shed no light on Congress' intent in enacting the FCUA. But its language demonstrates, contrary to the court of appeals' reasoning, that when Congress employs the precise phrase at issue in this case—"groups having a common bond"—it does not necessarily intend to imply that a single bond unites all of the groups.

Nor is a contrary conclusion compelled by the separate clause in Section 1759 providing that Federal credit union membership may also consist of "groups within a well-defined neighborhood, community, or rural district." According to the court of appeals, if this clause were interpreted consistently with NCUA's policy on multiple occupational groups, a single community-based credit union could include groups from different communities. Pet. App. 8a. Because NCUA does not so interpret the com-

munity clause, the court reasoned that it would be inconsistent to interpret the occupational clause as permitting a credit union to consist of multiple groups sponsored by different employers. *Id.* at 8a-9a. *See also First City Bank* v. *NCUA*, 1997 WL 174314 at *3 (6th Cir. April 14, 1997) (adopting same argument); *but see id.* at *7 (Jones, J., dissenting) (rejecting it).

This reasoning is plainly wrong. The occupational and community clauses are not identical: whereas the occupational clause provides that membership shall consist of "groups having a common bond of occupation," the community clause provides that membership shall consist of groups "*within*" a well-defined area. While this latter language may suggest that all the groups comprising the membership must be "within" the same area, the occupational clause contains no such limitation and (as explained above) can be read naturally as providing that the common bond applies to each group in a credit union, not across all of the groups. *See id. at* *9 (Jones, J., dissenting) (view that "the terms of the common bond provision and the community provision must be interpreted in exactly the same way is reading more into the statute than the actual words suggest").

Thus, a provision specifying that "league membership shall be limited to teams within a well-defined area" is perhaps most naturally read to suggest that all the teams must be from the same area, while a provision specifying that "league membership shall be limited to teams having a common uniform color" carries no similar suggestion that all the teams have the same uniform color. This critical difference in the language of the two clauses supports NCUA's separate interpretations of them, and certainly does not demonstrate that the statute is unambiguous.

C. The Purpose Of The Statute And Its Legislative History Do Not Clearly Demonstrate That Congress Resolved The "Precise Question" Presented In This Case

Under *Chevron*, a court must defer to an agency's reasonable interpretation of a statute it is entrusted to administer unless the court, "employing traditional tools of statutory construction," concludes that the "intent of Congress is clear" with regard to the "precise question at issue." 467 U.S. at 842-843 & n.9. Where, as here, the language is ambiguous, *Chevron* allows only a limited role for such traditional tools as legislative history and statutory purpose. The Court may not simply examine the legislative history and purposes of the statute and impose "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. Rather, the Court must defer to the agency's interpretation unless the legislative history and purposes of the statute "compel the conclusion" that Congress clearly resolved the precise question at issue. *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). If the legislative history is "conflicting" or "ambiguous," then the agency's interpretation is entitled to deference. *Rust* v. *Sullivan*, 500 U.S. 173, 185 n.3, 186 (1991).

Here, the legislative history and statutory purpose do not clearly demonstrate that Congress resolved the precise question whether a federal credit union may consist of multiple occupational groups, each with its own common bond. As the district court held, the legislative history is in fact "murky" on that question and is only a "slender reed on which to place reliance." Pet. App. 30a.[14] Indeed, there is some evidence in the legislative history that Congress intended to permit multiple groups. The House Re-

[14] The court of appeals did not disagree. Rather, in light of the court's erroneous conclusion that the plain language of the statute unambiguously resolved the issue, the court concluded only that the legislative history was not sufficiently compelling to override what the court considered to be clear statutory language. Pet. App. 11a-12a.

port on the FCUA provides that "[m]embership in Federal credit unions is limited to *groups* having common bonds of occupation or association or to groups within well defined communities." H.R. Rep. No. 2021, *supra*, at 3 (emphasis supplied). A colloquy during House consideration of the Act likewise indicates that Congress may have believed that a credit union could consist of multiple occupational groups. In response to a question whether the FCUA would "take care of small business men who have one or two clerks," Rep. Luce answered that "I have no reason to believe that they cannot join the union and profit thereby * * *." 78 Cong. Rec. 12,225 (1934). A credit union of one or two members is not economically feasible, either now or in 1934. *See* IRPS 89-1, 54 Fed. Reg. 31,171 (1989) (NCUA policy that credit unions should not have less than 500 members). Accordingly, this colloquy indicates that Congress may have believed that a small business with only a few employees could "join" an existing credit union.[15]

As the district court concluded, "[t]he legislative record, taken as a whole, does not provide the clear and certain indication that Congress intended to preclude the NCUA's current interpretation of the common bond provision." Pet. App. 21a. Selective excerpts from legislative history are of dubious utility even where the Court is interpreting a statute *de novo*. Where, as here, the task is to determine whether Congress has clearly resolved a precise

[15] The Banks have relied on a statement in the Senate Report describing a credit union as a cooperative society "organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, limited in each case to the members of a specific group with a common bond of occupation or association * * *." S. Rep. No. 555, *supra*, at 2. This statement, however, was not purporting to describe Congress' intent in enacting the common bond provision. Rather it was simply a response under the heading "What is a credit union?," and therefore is best read as a general description of the membership of most credit unions of the day. As the district court held, the statement "may well be little more than a description of the field of state credit unions as they existed in 1934." Pet. App. 20a.

question on which the statutory language is ambiguous, such conflicting excerpts are of no use whatsoever.

Nor do the general purposes of the statute clearly demonstrate that Congress has resolved the multiple group issue. The court of appeals held that because the common bond provision was intended to foster a "cohesive association in which the members are known by the officers and by each other," there was "little doubt that growth on the scale achieved by ATTF is inconsistent with that purpose." Pet. App. 10a. The court of appeals' reasoning, however, cannot withstand scrutiny. Congress did not intend that all members of a credit union necessarily be "known by the officers and by each other." At the time the FCUA was enacted, Congress was well aware that there were credit unions that contained thousands of members, *see Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933), and one of Congress' main purposes in enacting the FCUA was to authorize *national* credit unions whose membership crossed state lines. *See* H.R. Rep. No. 2021, *supra*, at 2. Even under the Banks' reading of the common bond provision, there would be large single-employer credit unions whose officers and members could not possibly all know one another. Recognizing this fact, NCUA and its predecessor—in actions that have never been challenged—long ago removed anachronistic regulations that had required all members of a credit union to "know" or be "extensively acquainted" with one another. *See* GAO, *Credit Unions: Reforms for Ensuring Future Soundness* 217 (July 1991); NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972).

Instead, the general purpose of the common bond provision, as explained above, was to increase the financial stability of credit unions by ensuring that members would be part of a cooperative organization. *See supra* at 20-21. As the court of appeals put it, "[t]he common bond was seen as the cement that united credit union members in a cooperative venture * * *." Pet. App. 31a. There are

sound economic reasons why cooperative lending societies might employ a common bond concept. Basing membership on some sort of pre-existing associational affinity allows a credit union to "loan on character," because the credit union would have better access to information on the reputation and creditworthiness of members; it helps to ensure repayment through the moral suasion and social pressure of fellow members; and it often allows a convenient means of securing that repayment (such as through payroll deductions for employer-based groups). *See* Henry Hansmann, *The Ownership of Enterprise* 259 (1996).

These general purposes, however, do not demonstrate that Congress necessarily foreclosed NCUA's multiple group policy. Under that policy, membership in any credit union must still be based on membership in some *group*. Unlike banks, credit unions may not serve any individual who desires service; rather, every credit union member must have a common bond of occupation or association with the other members of his or her group. Thus, under NCUA's multiple group policy, a credit union member will be less likely to default because the member would know that his or her co-workers might be affected. Likewise, the credit union would still gain (through the group sponsor or a member's co-workers) additional information about creditworthiness that a bank would not have. In short, any benefits that would result from limiting credit union membership to individuals who have a common bond with other members can be achieved through the multiple group policy.

The court of appeals' focus on the size of ATTF's membership is therefore misplaced. The benefits of an occupational common bond result not from the size of the organization, but from the fact that each member is part of a cooperative venture with his or her co-workers. For example, in a large, nationwide single-employer credit union (which even the Banks admit is lawful), the benefits of the common bond are achieved not because every member knows and is able to keep tabs on every other

member throughout the country, but because every member is united in some way with a group of employees with whom he or she works. The multiple group policy is true to this purpose. Even the court of appeals would allow a credit union to contain multiple groups consisting of employees of separate companies located thousands of miles apart, where the only connection between the companies is common ownership. *See* Pet. App. 7a. There is no reason why this credit union would further the purposes of the common bond provision any more than would a credit union composed of the same groups where common ownership is lacking.

It is simply not true, as the court of appeals suggests, that under the multiple group policy a federal credit union "could accept anyone as a member simply because he or she is employed." Pet. App. 10a. Under NCUA's interpretation of the statute, membership in a credit union may not be opened to anyone who has a job, because the mere fact of employment—although it may define a "group" of individuals—does not qualify as a common bond. Nor can a credit union circumvent that restriction by attempting to designate its membership as the employees of every firm in the country. Under NCUA's interpretation of the statute, each group in a credit union must separately request inclusion in the credit union, and NCUA scrutinizes such requests to determine that the credit union has the financial resources and management capability to provide quality service to each group, and that credit unions will not have overlapping memberships. *See* 59 Fed. Reg. 29,078 (1994).[16]

Finally, as explained above, Congress' express purpose in enacting the common bond provision and the entire

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[16] Such challenges to the reasonableness of NCUA's interpretation are, in any event, properly addressed under the second prong of the *Chevron* analysis. *See Chevron*, 467 U.S. at 843-844. The Banks have limited their challenge in this case to the first prong. *See* Pet. App. 6a ("FNBT argues this case under step one of *Chevron* only."); *id.* at 23a ("Plaintiffs have not seriously argued that the interpretation under challenge is unreasonable.").

FCUA was not merely to ensure that credit union members were part of a cooperative venture—Congress' primary purpose was to encourage the growth and financial stability of credit unions. NCUA's multiple group policy —adopted to increase the growth and strength of federal credit unions in the face of changing economic circumstances—is entirely consistent with that overriding purpose. *See* J.A. 41-43; 49 Fed. Reg. 46,537 (1984); 48 Fed. Reg. 4799 (1983). As NCUA has explained, because many employer groups are too small to support a credit union by themselves, the multiple group policy allows credit union services to be provided to many workers who otherwise would not have access to them. J.A. 42-44. And because credit unions limited to a single employer are perilously vulnerable to downturns within that industry or company, the diversification allowed by the multiple group policy provides needed financial stability. *Id.* at 43-44.

The purposes of the statute, like its language and legislative history, thus do not clearly demonstrate that Congress has spoken to the precise issue presented by this case. "Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches," for "the resolution of ambiguity in a statutory text is often more a question of policy than of law." *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Here, whether by design or accident, Congress enacted an ambiguous statute that does not resolve the precise question presented by this case. Given that fact, it is the role of NCUA—not the courts—to resolve that ambiguity through an exercise of its expert policy judgment.

D. NCUA's Policy Is A Reasonable Balancing Of Congress' Policy Objectives

Neither in the district court, the court of appeals, or their brief in opposition to certiorari did the Banks advance the argument that, if the statutory language were held to be ambiguous, NCUA's multiple group policy is

nevertheless unreasonable and should be invalidated under the second step in the *Chevron* analysis. *See* Pet. App. 6a, 23a. Accordingly, the Court should not consider that issue. *See, e.g., Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990). It is little wonder, however, that the Banks did not raise this argument. For, as the district court noted, this "would be a daunting task" because "NCUA's interpretation in fact advances Congress' goal of promoting the creation and growth of credit unions." Pet. App. 24a.

Under *Chevron*, once the Court concludes that Congress has not spoken to the precise question at issue, the agency's interpretation must be sustained if it is "reasonable in light of the legislature's revealed design." *NationsBank*, 115 S. Ct. at 813-814. NCUA's multiple group policy is plainly reasonable in light of Congress' purposes in enacting the FCUA. The agency has adopted a policy that strikes a reasonable balance between Congress' twin goals of encouraging the growth and viability of federal credit unions and ensuring that credit union members are part of a cooperative venture with others similarly situated. The reasonableness of this balancing of policy objectives is further supported by the fact that Congress has been well aware of the multiple group policy for nearly 15 years without altering it, despite amending the FCUA on numerous occasions. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) ("a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction").

Agencies do not " 'establish rules of conduct to last forever,' " but rather must have "ample latitude to 'adapt their rules and policies to the demands of changing circumstances.' " *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (citation omitted). *See also Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996); *Rust* v. *Sullivan*, 500 U.S. at 186-187. When Congress established NCUA,

it directed the agency to "provide more flexible and innovative regulation." S. Rep. No. 518, *supra*, at 3. In response to that mandate, NCUA's common bond policy has evolved over the years in order "to reflect changing social, commercial and economic conditions." 44 Fed. Reg. 8272, 43737 (1979).

The multiple group policy was adopted specifically in response to changes in the general economy and in the economics of credit unions in particular. That policy was plainly a reasonable response to the potential instability of single group credit unions, whose fates are tied to the fortunes of a single company or industry, and to their inability to serve many individuals employed by companies too small to support a credit union on their own. *See* J.A. 43-44; *see also* Stephen A. Woodbury, David M. Smith & William A. Kelly, Jr., *An Analysis of Public Policy on Credit Union Select Employee Groups* 2-3 (U. Wisc.-Madison 1997) (62% of Nation's workers are employed by firms that are too small to support a single-group credit union under NCUA guidelines). Moreover, as the district court held, because the potential harm from credit union defaults diminished with the advent of share insurance in 1970, NCUA could reasonably decide that a restrictive interpretation of the common bond provision was no longer needed. *See* Pet. App. 23a.

The reasonableness of NCUA's multiple group policy is further shown by its unqualified success and by the enormous harm that would result if the Banks were to prevail in this action. The policy has been a principal means for the growth in federal credit union membership since 1982. It has allowed approximately 3,500 credit unions (half of all federal credit unions nationwide), serving more than 32 million people in about 156,000 employer groups, to diversify their membership in a manner that protects the safety and soundness of the credit union system and the resources of the National Credit Union Share Insurance Fund. *See* Second Marquis Decl. ¶ 5; Third Declaration of David M. Marquis ¶ 7 (Nov. 14, 1996) (R. 105). At the same time, the rate of credit

union failures has declined steadily, belying the Banks' premise that the multiple group policy has compromised the protections inherent in the common bond provision. *See* NCUA 1995 Annual Report 23; NCUA 1994 Annual Report 20; NCUA 1993 Annual Report 14.

Conversely, if the Banks were to be successful in overturning NCUA's multiple group policy, the result could be devastating for credit unions throughout the Nation and for the individuals who depend on them for low-cost financial services. As NCUA determined in promulgating that policy, prohibiting diversification of membership will increase the level of credit union defaults and liquidations, and will profoundly affect the financial health of thousands of federal credit unions. And as Congress determined when it enacted the FCUA, many of the low-income individuals whom the Banks seek to prevent from joining federal credit unions would be unable to utilize the services of banks or could do so only at higher cost.

* * * *

These considerations not only demonstrate the reasonableness of NCUA's balancing of Congress' policy objectives, but also starkly confirm that the Banks' interests in dismembering credit unions are completely at odds with Congress' purposes of encouraging the growth and financial stability of a national credit union system. Accordingly, the Court should find that the Banks lack standing to prosecute this action. But even if the Court were to hold otherwise, it should nevertheless uphold NCUA's reasonable resolution of the ambiguous statutory language.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT STATUTES

Section 1759 of Title 12, U.S.C., provides in pertinent part:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

Section 702 of Title 5, U.S.C., provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Supreme Court, U.S.
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Nos. 96-843 and 96-847

In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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57 pp

QUESTIONS PRESENTED

The Federal Credit Union Act (FCUA) limits federal credit union membership "to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. The questions presented are:

1. Whether banks, which the court of appeals found not to be among the intended beneficiaries of the FCUA, nonetheless fall within the "zone of interests" of that Act to have standing to challenge the interpretation by the National Credit Union Administration (NCUA) of the FCUA's common bond requirement.

2. Whether the NCUA reasonably interpreted the common bond provision to permit membership in a federal credit union to consist of multiple groups, so long as each group has its own common bond.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-843

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

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No. 96-847

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

OPINIONS BELOW

The opinion of the court of appeals on the merits (Pet. App. 1a-14a) is reported at 90 F.3d 525. The opinion of the district court (Pet. App. 43a-54a) is reported at 863 F. Supp. 9. The opinion of the court of appeals addressing standing (Pet. App. 15a-31a) is reported at 988 F.2d 1272. This Court's denial of certiorari is reported at 510 U.S. 907. The district court's disposition of the standing issue (Pet. App. 32a-42a) is reported at 772 F. Supp. 609. A subsequent opinion of the district court enjoining the National Credit Union Administration (NCUA) from

continuing to implement its interpretation of the Federal Credit Union Act (Pet. App. 55a-62a) and an order clarifying the injunction (Pet. App. 63a-65a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1996. A petition for rehearing was denied on October 23, 1996. The petitions for writs of certiorari were filed on November 26, 1996, and November 27, 1996, respectively, and were granted on February 24, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1759 of Title 12, United States Code, provides in pertinent part (emphasis added):

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.*

Section 702 of Title 5, United States Code, provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

STATEMENT

This case presents a challenge to the National Credit Union Administration's (NCUA) interpretation of the "common bond" provision of the Federal Credit Union Act (FCUA). Since 1982 the NCUA has permitted membership in a federal credit union to consist of multiple occupational groups, so long as each group has its own common bond. Members of the banking industry, however, contend that the "common bond" provision requires that all members of a federal credit union share a single common bond.

1. a. The origins of cooperative credit associations date to mid-19th century Europe, where credit associations were established in response to the need of small entrepreneurs, wage earners, and farmers for better credit services. See General Accounting Office, *Credit Unions: Reforms For Ensuring Future Soundness* 24 (July 1991) (GAO Report).[1] The first credit unions in this country generally were formed around groups of persons who otherwise were associated with each other. *Id.* at 216. To promote their development, early in this century many States enacted laws for chartering and regulating credit unions, beginning with the Massachusetts Credit Union Act in 1909. *Ibid.*

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[1] We have lodged with the Clerk and served on the parties copies of the following: A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* (2d ed. 1992); J. Burns, *Origin of the Term Common Bond in Credit Union Usage* (1979); General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* (July 1991) (GAO/GGD-91-85); The Secura Group, *The Credit Union Industry: Trends, Structure, and Competitiveness* (1989).

Pioneers of the credit union movement viewed credit unions as a means of satisfying the demand for loans by persons of modest financial resources—a service that was not being supplied by existing banking institutions. Credit unions enabled people who lacked the collateral for bank loans to borrow money at reasonable rates of interest and under honest and fair conditions in times of necessity or distress. J. Moody & G. Fite, *The Credit Union Movement* 33-35 (1971).

From the earliest days of the credit union movement, use of a common bond or commonality of interest was encouraged as a basis for founding a credit union. See A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 6 (2d ed. 1992) (Burger & Dacin); GAO Report at 216. It was assumed that a common bond of membership "made it cheaper for a credit committee to establish a borrower's credit worthiness, provided a sense of cohesiveness and mutual support among members, and generally promoted the financial stability of credit unions." Burger & Dacin at 8. Thus, by "focusing on founding credit unions on the basis of common bond, the credit union industry began to flourish. * * * [The common bond] proved to be a viable mechanism with which to found new credit unions and easily spread credit union principles across the United States." *Id.* at 6-7.

By 1934, after the collapse of the nation's credit markets in the Great Depression, 38 States had enacted laws to promote credit unions, many of which sought to define fields of membership in terms of "common bond." In 1932 Congress passed an analogous statute for the District of Columbia. District of Columbia Credit Unions Act, ch. 272, 48 Stat. 326; see S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). Two years later, Congress enacted the Federal Credit Union Act, ch. 750, 48 Stat. 1216 (codified

at 12 U.S.C. 1751 *et seq.*). At that time, funds available for loans were scarce and interest rates were too high to enable persons of limited means to purchase goods on credit. See S. Rep. No. 555, *supra*, at 1, 3; H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Because Congress perceived that the nation's "industrial recovery depend[ed] on the buying power" of ordinary citizens, it established "a Federal Credit Union System" to "bring normal-credit resources on a cooperative basis" to people. S. Rep. No. 555, *supra*, at 1, 3; see H.R. Rep. No. 2021, *supra*, at 1-2. Small borrowers would benefit by having an alternative to banks, which often would not lend small amounts of money to persons lacking the requisite security, and to "loan sharks," who charged usurious rates. See, *e.g.*, 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12,224 (remarks of Rep. Luce). An expansion of credit unions would also facilitate the education of "members in matters having to do with the sane and conservative management of their own money." S. Rep. No. 555, *supra*, at 2.

Expanding access to credit unions, therefore, was a congressional priority. For despite the country's financial upheaval, in the "38 States and in the District of Columbia" where credit unions operated, there had been "no involuntary liquidations," and credit unions had compiled an "exceptional * * * record for honest management." S. Rep. No. 555, *supra*, at 2. See also 78 Cong. Rec. 7259, 12,225 (1934) (remarks of Sen. Sheppard, Rep. Patman).

Under the FCUA, each federal credit union is funded by shares purchased by its members,[2] see 12 U.S.C. 1757(6), and makes loans exclusively to its members and

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[2] In the parlance of credit unions, deposits of funds by persons are "purchases" of "shares" by "members" of the credit union.

to other credit unions or credit union organizations. 12 U.S.C. 1757(5). The members control the credit union on a democratic basis, with each member having an equal vote regardless of the amount of money held in the institution. 12 U.S.C. 1760. A federal credit union is managed by a board of directors, a supervisory committee, and (where the bylaws so provide) a credit committee, all consisting of credit union members who serve without compensation. 12 U.S.C. 1761.[3] Although originally uninsured, credit union accounts became insured by congressional legislation in 1970. See Act of Oct. 19, 1970, Pub. L. No. 91-468, 84 Stat. 994; 12 U.S.C. 1781-1790c.

In 1970 Congress also created the NCUA and empowered it to charter, examine, and supervise federal credit unions. The NCUA generally has the authority to "prescribe rules and regulations for the [FCUA's] administration." 12 U.S.C. 1766(a). Congress intended the NCUA to "provide more flexible and innovative [credit union] regulation." S. Rep. No. 518, 91st Cong., 1st Sess. 3 (1970).[4]

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[3] The statute permits federal credit unions to compensate one board officer. 12 U.S.C. 1761a.

[4] With the enactment of the FCUA, Congress reposed regulatory authority over federal credit unions in the Farm Credit Administration (FCA). In 1939 the FCA was transferred to the Department of Agriculture by Reorganization Plan No. 1 of 1939, § 401, 53 Stat. 1429 (set out in 5 U.S.C. App. 1). Between 1942 and 1948 the Federal Deposit Insurance Corporation (FDIC) had regulatory authority over federal credit unions. See Exec. Order No. 9148, 7 Fed. Reg. 3145 (1942); Reorganization Plan No. 1 of 1947, § 401, 61 Stat. 952 (set out in 5 U.S.C. App. 1). In 1948 Congress created the Bureau of Federal Credit Unions (BFCU) within the Social Security Administration (SSA), an agency of the Federal Security Agency (FSA). See Act of June 29, 1948, ch. 711, §§ 1, 2, 62 Stat. 1091. In 1953 the BFCU was transferred with other functions and agencies of the FSA to the Department of Health, Education and Welfare. Reorganization Plan No. 1 of 1953, § 5, 67 Stat. 632 (set out in 5 U.S.C. App. 1). In 1970 the duties of the BFCU were transferred to a newly created independent agency within the Executive Branch, the NCUA. See Act of Mar. 10, 1970, Pub. L. No. 91-206, § 6, 84 Stat. 49.

b. Since its passage in 1934, the FCUA has limited membership in a federal credit union to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." 12 U.S.C. 1759. See ch. 750, § 9, 48 Stat. 1219. The history behind the original FCUA legislation reveals little about Congress's precise intent in using the phrase "common bond," but the requirement facilitated the expansion of credit unions, because it was "easier to promote the idea of a credit union to a group or an association whose members already had a common bond." Letter from E.F. Callahan, NCUA Chairman, to Fernand J. St Germain, Chairman of House Comm. on Banking, Finance, and Urban Aff. (Oct. 28, 1983), J.A. 41; see also Burger & Dacin at 8 (organizing credit unions around "particular groupings" was "simply easier" and involved "generally lower * * * start-up costs").

c. In response to changing economic conditions, the NCUA and its predecessors from time to time have modified their application of the common bond provision.[5] In 1982 the NCUA adopted a policy permitting the

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[5] Thus, for example, in 1967 federal credit union regulators replaced their requirement that members of a federal credit union be "extensively acquainted" with each other with the requirement that members simply "know" one another. GAO Report at 217. A year later, regulators instituted a policy that, once a person became a credit union member, he or she could remain a member for life. *Ibid.* And in 1972 the NCUA took account of the growing phenomenon of industrial and commercial parks to permit satisfaction of the common bond requirement "if the employees are so situated that as a consequence of their employment and relationship they can be expected to effectively operate a credit union." NCUA, *Organizing a Federal Credit Union* 7

establishment of credit unions consisting of "multiple occupational * * * groups." Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775 (1982). Under that policy, the agency permitted a credit union to add "distinct group[s]" to its field of membership, so long as each group had its own common bond and was within a well-defined area near the credit union's offices. IRPS 82-3, 47 Fed. Reg. 26,808 (1982).

In his 1983 letter to Representative St Germain, NCUA Board Chairman Callahan explained the important purposes served by the NCUA's policy. See J.A. 43-45. First, experience showed that "some groups were too small either by themselves or when grouped together to support a viable credit union," so a policy of permitting multiple group additions ensured that credit unions "could serve groups not otherwise eligible for a viable credit union charter." J.A. 44. Second, permitting diversification of credit union membership provided a measure of protection against "hard economic times." *Ibid.* As Chairman Callahan pointed out, "[c]redit unions that served only one employer or one industry could be forced into liquidation by plant closings or major industrial slumps." *Ibid.* By contrast, "a credit union whose membership was made of distinct groups, each group serving different employees or industries, could continue to serve its members," *ibid.*, thereby furthering the FCUA's intent to promote "a national system of cooperative credit," J.A. 42.

The NCUA consolidated and restated its chartering and field of membership policy in 1989. See IRPS 89-1, 54 Fed. Reg. 31,168. At that time, the agency reaffirmed

(Sept. 1972), C.A. App. 456. The banks do not challenge those regulations as impermissible applications of the common bond requirement.

that it would permit "select group additions" to federal credit union membership. *Id.* at 31,176. The agency again made clear that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond," but counseled that "[t]he group's common bond need not be similar to the common bond(s) of the existing Federal credit union." *Ibid.* The NCUA reiterated its position through a policy statement issued in 1994. See IRPS 94-1, 59 Fed. Reg. 29,066, 29,078, 29,085.

d. Nearly 3600 federal credit unions serving over 32 million people throughout the country have memberships defined by multiple occupational groups. Those credit unions hold 79% ($132 billion) of the deposits (shares) and 78% ($94 billion) of the loans of the federal credit union system.[6]

2. a. Several North Carolina banks, joined by the national trade association for the banking industry (respondents or banks), filed the present suit. The banks sought to overturn NCUA's 1989 and 1990 approvals of requests by AT&T Family Federal Credit Union (ATTF), a federally-chartered credit union headquartered in Winston-Salem, North Carolina, to expand its field of membership to include various groups of employees of small businesses chiefly based in North Carolina and Virginia. See Pet. App. 2a, 18a. All told, ATTF has approximately 111,000 members, 35% of whom are employees of AT&T (or affiliates); the rest are employees of "select employee groups" that were added pursuant to the NCUA's multiple group policy. The suit

[6] Second Declaration of David M. Marquis ¶ 5, *American Bankers Ass'n* v. *NCUA*, Nos. 96-5347 et al. (D.C. Cir) (filed Dec. 11, 1996).

alleged that the NCUA approvals violated the statutory limitation on federal credit union membership to "groups having a common bond of occupation or association." 12 U.S.C. 1759. After permitting ATTF to intervene as a defendant, the district court dismissed the respondents' claims for lack of standing. The court held that the respondents were not within the "zone of interests" protected by the FCUA. Pet. App. 36a-42a.

b. The court of appeals reversed and remanded the case for proceedings on the merits. Pet. App. 15a-31a. The court agreed with the district court that, in enacting the common bond requirement, "Congress did not * * * intend to shield banks from competition from credit unions." *Id.* at 21a. Indeed, the court found "the very notion * * * anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *Ibid.* But while it conceded that banks were not the "intended beneficiaries" of the FCUA's common bond requirement (see *id.* at 19a), the court nonetheless decided they were "suitable challengers" to enforce the provision. *Id.* at 22a. It reasoned that, as competitors, banks had an "interest in confining [credit unions] within certain congressionally imposed limitations," including the common bond requirement, and so "[could] sue to prevent the alleged loosening of those restrictions, even if [their] interest is not precisely the one that Congress sought to protect." *Id.* at 24a.

The court noted that the Fourth Circuit in *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 626 (1986), cert. denied, 479 U.S. 1063 (1987), had previously reached a contrary result by "focus[ing] exclusively on the question whether banks' interests were intended to be protected under [the common bond provision of] the

FCUA." Pet. App. 24a n.3. The court believed, however, that this Court's "subsequent explication of the suitable challenger route to standing in *Clarke* [v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987),] emptie[d] the *Branch Bank* decision of its persuasiveness." *Ibid.*

Judge Wald concurred in the judgment on the ground that the court's application of the "suitable challenger" doctrine was controlled by circuit precedent. See Pet. App. 30a. She expressed her continuing disagreement, however, with the "suitable challenger" test as "without roots either in Supreme Court law or in the general purposes of standing." *Ibid.* (footnote omitted) (citing *Hazardous Waste Treatment Council* v. *Thomas*, 885 F.2d 918, 927-934 (D.C. Cir. 1989) (Wald, C.J., dissenting)).[7]

c. On remand, the district court granted summary judgment to NCUA and ATTF, holding that NCUA's construction of Section 1759 was "a reasonable construction of an ambiguous statute." Pet. App. 54a.

d. Again the court of appeals reversed. Pet. App. 1a-14a. The court concluded that Congress's intent to limit federal credit union membership to groups that are bound by a single common bond is "clearly discernible from the statutory text and the purpose of the statute." Pet. App. 6a. Invoking *Chevron U.S.A. Inc.* v. *Natural*

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[7] ATTF and its trade association filed a petition for certiorari, which this Court denied. *AT&T Family Fed. Credit Union* v. *First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). The NCUA opposed the petition for certiorari because of the interlocutory posture in which the issue came to the Court, and advised that the issue would be more efficiently handled after the merits of the case had been decided. The NCUA nonetheless agreed with the petitioners that "the respondent banks are not within the zone of interests protected by the common bond provision of the Federal Credit Union Act." 92-2010 Gov't Br. in Opp. at 5-6.

Resources Defense Council, Inc., 467 U.S. 837 (1984), the court determined that Congress had spoken "directly" and "unambiguously" to the question in a manner inconsistent with the interpretation given to it by the NCUA. Finding no ambiguity in the statutory language, the court concluded that deference was inappropriate. See Pet. App. 5a-6a.

The court reasoned that the term "common bond" in Section 1759 "would be surplusage if it applied only to members of each constituent group and not across all groups of members" in a federal credit union because "the members of a group are by definition bonded." Pet. App. 7a. Thus it found that the text of the "Act clearly forecloses" the possibility of "the employees of unaffiliated Company B * * * join[ing] the [federal credit union] at Company A." *Id.* at 8a.

The court further analyzed the statutory text by comparing use of the term "groups" in the parallel provisions of Section 1759: one involving "groups having a common bond of occupation," and the other consisting of "groups within a well-defined neighborhood, community, or rural district." Pet. App. 8a. The court noted that "[t]he statute does not allow multiple groups, each within a different neighborhood, to form a single community [federal credit union]." It thereby reasoned that "[n]or therefore can the statute consistently allow multiple groups, each drawn from a different occupation (which the NCUA equates with a different employer), to form an occupational [federal credit union]." *Id.* at 9a.

The court did not find the legislative history to be so contrary to its textual analysis as to require a different result. It rejected the NCUA's arguments that its regulations provided other limitations to the nature and structure of federal credit unions, and concluded that the over-arching purpose of the common bond requirement

was to "unite[] credit union members in a cooperative venture," a purpose that would be frustrated by the NCUA's interpretation allowing multiple unrelated groups to form an occupational federal credit union. Pet. App. 12a. Based on that reasoning, the court held that "all members of an FCU must share a common bond," and "[i]f there are multiple occupational groups within a single credit union, then it is not sufficient that the members of each different group have a bond common to that group only." *Id.* at 14a.[8] The court reversed the district court's judgment and remanded the case "for the entry of declaratory and injunctive relief, consistent with the foregoing opinion, concerning the NCUA's 1989 and

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[8] The Sixth Circuit, with one judge dissenting, has recently issued a decision agreeing with the judgment of the D.C. Circuit. *First City Bank* v. *NCUA*, No. 95-6543, 1997 WL 174314 (Apr. 14, 1997). Unlike the D.C. Circuit, however, the Sixth Circuit rejected as "unconvincing" *all* arguments asserting that the meaning of the term "groups having a common bond of occupation or association" could be discerned from the language of the clause alone. *Id.* at *5-*6. It nonetheless found persuasive the argument that "because the occupational clause ('limited to groups having *a* common bond of occupation') is followed directly by the community clause ('groups within *a* well-defined neighborhood, community, or rural district'), and because the two share the same syntactical structure, the two ought to be interpreted consistently." *Id.* at *6. It concluded that "since the NCUA only permits community-based credit unions to be based on membership in a single group from a single neighborhood, as opposed to multiple neighborhoods, the agency [therefore] should apply the same interpretation to the occupation-based credit unions." *Ibid.* In fact, however, NCUA places no restriction on the number of groups that can comprise a community credit union. The restriction in the statute requires only that all groups in such a credit union be "within a well-defined neighborhood, community, or rural district."

1990 approvals of certain applications filed by ATTF." *Ibid.* On October 23, 1996, the court denied rehearing.[9]

SUMMARY OF ARGUMENT

I. The court of appeals' decision on standing constitutes an unwarranted expansion of this Court's test for prudential "zone of interests" standing in actions brought under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* To establish that they are within the "zone of interests" for standing under the APA, the

[9] On October 7, 1996, the American Bankers Association and two other plaintiffs filed a new action in district court seeking a temporary restraining order to prevent the addition of new select employee groups (SEGs) to all federal credit unions, as well as to bar the addition of new members to any existing group. *American Bankers Ass'n* v. *NCUA*, No. 96-CV-2312 (TPJ). The district court consolidated this new action with the existing case. On October 25, 1996, based on the D.C. Circuit's prior determination settling the meaning of the statutory common bond provision, the district court declared unlawful "membership in a federal credit union by individuals or groups of individuals who do not share a single common bond of occupation with all other members thereof." Pet. App. 61a. Accordingly, that court permanently enjoined the "National Credit Union Administration, its officers, attorneys, agents, employers, and all others in active concert or participation with it, including [ATTF and the Credit Union National Association] * * * from henceforth authorizing occupational federal credit unions to admit members who do not share a single common bond." *Ibid.* The October 25, 1996, order applies the D.C. Circuit's common bond ruling on a nationwide basis through an injunction covering the NCUA's regulation of all credit unions.

The NCUA *et al.* filed an appeal from the October 25 injunction on November 15, 1996. On December 24, 1996, the D.C. Circuit granted a stay of that portion of the district court order barring credit unions from enrolling new members of previously approved employee groups pending appeal or disposition of the petitions for certiorari.

Still pending in the district court is respondents' motion to order retroactive divestiture of groups or members who do not share a common bond with the core group.

banks must show that Congress intended to protect their interests in the common bond requirement imposed in Section 1759. *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Neither the language nor the legislative history of the common bond requirement indicates that it was intended to protect banks from competition. Rather, the common bond requirement exists to protect credit unions and their members by providing stability and promoting the rapid proliferation of credit unions across the country capable of bringing credit relief to the vast array of persons of lower-to-middle incomes that banks traditionally spurned.

The court of appeals acknowledged that the common bond provision was not intended to shield banks from competition from credit unions and that, in fact, the very notion seemed anomalous in light of Congress' general purpose of encouraging the formation of credit unions, which were expected to provide service to persons not being served by banks. The court erred, however, in concluding that banks had standing to contest the NCUA's interpretation of the requirement because their status as competitors made them "suitable challengers." The court's standing determination permits plaintiffs to bring claims under a statute not just when there is no affirmative indication of congressional purpose to benefit them, but when there is every indication that Congress did *not* intend to do so. Application of the "suitable challenger" test is incompatible with this Court's zone-of-interests cases, which require that the plaintiff demonstrate that Congress intended the statutory provision at issue to protect a commercial interest of the plaintiff.

In this regard, the court of appeals mistakenly concluded that Congress intended the common bond requirement to be a limitation on the growth of credit

unions, effectively restricting credit unions from competing with banks. That requirement is not an entry-restricting provision designed to protect banks or limit the size of credit unions, but rather a requirement designed to promote the growth and stability of credit unions while ensuring the responsiveness of credit unions to their members.

II. On the merits, the court of appeals also erred in overturning the agency's interpretation. It is well settled that the reasonable construction of an ambiguous federal statute by the agency charged with its administration may not be invalidated. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). In this case, the language of the common bond requirement of Section 1759—which limits "Federal credit union membership" to "*groups* having a common bond of occupation or association"—is ambiguous, as the court of appeals at first appeared to recognize: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." Pet. App. 6a. As a matter of grammar and syntax, the court of appeals erred in concluding that the phrase "groups having a common bond" should be read the same as the accompanying phrase in Section 1759, "groups within a well-defined neighborhood." The latter phrase is a prepositional phrase containing a limitation on the noun "groups" to the object of the phrase "a well-defined neighborhood." On the other hand, the participial phrase "having a common bond" has no such limiting purpose grammatically. Because that phrase would function just as readily if the noun "groups" were considered individually or in the collective, the phrase is inherently ambiguous in the context of federal credit union membership, which may be composed of one or more groups.

Under *Chevron*, therefore, the NCUA's interpretation of the common bond provision is entitled to deference. 467 U.S. at 842-843.

The NCUA's multiple group policy substantially furthers the goals of the FCUA in promoting the growth and stability of credit unions, see S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934), by placing credit union services within the reach of those businesses with too few employees to support a viable credit union by themselves and by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court of appeals' interpretation frustrates those central goals of the FCUA. Finally, Congress's failure to overturn the NCUA's interpretation despite being well aware of it is further support for the reasonableness of the agency's construction of the statute.

ARGUMENT

I. BANKS LACK STANDING TO ENFORCE THE COMMON BOND REQUIREMENT IN 12 U.S.C. 1759

The FCUA itself does not provide respondents with a cause of action to enforce the common bond provision or to claim in any other way that the NCUA has misconstrued the statute. The banks assert standing to sue for alleged violations of Section 1759 under the Administrative Procedure Act, which empowers a court to "set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706.

An entity does not have standing to bring suit under the APA unless it can show that it has suffered injury in fact and thus has been adversely affected or aggrieved by agency action, and that the injury of which it complains "falls within the 'zone of interests' sought to be protected

by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). See also *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997); *Air Courier Conference of America* v. *American Postal Workers Union*, 498 U.S. 517, 523-524 (1991). The essential inquiry posed by the zone-of-interests test is one of congressional intent: whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency action. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). Accordingly, "where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Ibid*.

A. Banks Are Not Within The Zone Of Interests Of The Common Bond Requirement

1. To establish that they fall within the zone of interests sufficient for standing, respondents must demonstrate that "their commercial interest was sought to be protected by the [common bond requirement]—the specific provision which they alleged had been violated." *Bennett*, 117 S. Ct. at 1167. The particular language of the common bond provision, however, provides no support for respondents' assertion that Congress intended to protect banks from competition. Banks are nowhere mentioned in Section 1759. Nor does the language otherwise reveal any concern with the commercial interests of banks. Rather, the provision relates exclusively to the internal composition and governance of credit unions. Especially when viewed in light of the Section's previous clause broadly permitting credit union membership to "consist of the incorporators and such other persons and

incorporated and unincorporated organizations * * * as may be elected to membership," the requirement that credit union membership consist of "groups having a common bond of occupation or association" indicates that the congressional concern was with facilitating the formation and stability of credit unions by identifying particular groupings around which credit unions could form. Properly read, the common bond provision is a prerequisite to the formation of a credit union and is designed to advance its economic feasibility. See 12 U.S.C. 1754 (requiring federal regulator to determine "the economic advisability of establishing the proposed federal credit union" before approving the organization certificate).

2. Nor does the history of the common bond provision suggest that it was intended for the benefit of the banking industry. As the court of appeals acknowledged, there is "no indication" that Congress was, at the time it enacted the common bond requirement in 1934, "concerned about the competitive position of banks." Pet. App. 22a. See also *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 626 (4th Cir. 1986) ("There is no evidence from any source * * * that Congress * * * intended by this provision to protect the competitive interests of banks."). Instead, the legislative history confirms that the common bond provision was designed to "advanc[e] the formation of credit unions among groups that may realistically operate with unity of purpose" and whose managers would "possess a common interest or occupation with the membership they serve." *Ibid*. See S. Rep. No. 555, *supra*, at 2-3; 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard). Such an arrangement was presumed to make credit unions "incapable of exploitation." S. Rep. No. 555, *supra*, at 3. Moreover, by ensuring "both that those making lending

decisions would know more about applicants and that borrowers would be more reluctant to default," the common bond requirement specifically was "designed to benefit the members—particularly potential borrowers—of credit unions." Pet. App. 21a-22a.

In those ways, the common bond requirement supported "Congress' general purpose * * * to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." Pet. App. 21a. As the court of appeals noted, that purpose is inconsistent with the notion that the common bond requirement was intended to shield banks from competition from credit unions. *Ibid.* The collapse of the nation's banking system in 1929 created a scarcity in funds available for loans; interest rates rose to usurious levels. S. Rep. No. 555, *supra*, at 3. Such high interest rates sharply reduced or eliminated the ability of many individuals, particularly the poor, to purchase goods on credit. *Id.* at 1, 3. Congress perceived that the Nation's "industrial recovery depend[ed] on the buying power" of as broad a sector of the American public as possible. *Id.* at 1. Congress also viewed banks as the principal culprits in the onset of the Great Depression and saw credit unions as alternatives to the "[c]ompetitive behavior by banks" that "lent recklessly to speculative ventures." A. Schwartz, "Financial Stability and the Federal Safety Net," in W. Haraf & R. Kushmeider, eds., *Restructuring Banking and Financial Services in America* 43 (1988). Accordingly, Congress designed the federal credit union system to "bring normal-credit resources on a cooperative basis" to persons "whose buying power is now so often dissipated in high-interest charges." S. Rep. No. 555, *supra*, at 1, 3.

Congress believed that a national credit union system would benefit lower-to-middle income families by providing them with an alternative to both banks and "loan sharks." See, *e.g.*, 78 Cong. Rec. 7259, 12,224 (1934) (remarks of Sen. Sheppard, Rep. Luce). Banks did not meet the credit needs of the vast majority of borrowers, who typically lacked adequate security to support a loan or who sought funds in amounts too small to justify a loan. *Id.* at 7259. Licensed money lenders, on the other hand, were certainly willing to lend small amounts to borrowers of modest means, but they charged exploitive rates of interest, since the usury laws of most States permitted interest rates of up to 42% per year. *Id.* at 12,224.

Congress, therefore, recognized that credit unions provided an attractive alternative to the existing credit system by permitting members "with their own money and under their own management to take care of their own short-term credit problems." S. Rep. No. 555, *supra*, at 2. The buying power of the people would thus be released towards the recovery of the nation's economy, instead of being eaten up by excessive interest charges. See *id.* at 1. Congress intended to establish a national system of credit unions as quickly as possible, and viewed credit unions as "capable of rapid mass development [because] they have to do with problems which affect the masses of the people." *Id.* at 2. And even though most States had laws providing for credit unions, the "need for much more rapid national development is * * * very great" because Congress understood that the "consumer-credit problem is a national problem which has no State limitations." *Id.* at 3-4. See also *First City Bank* v. *NCUA*, No. 95-6543, 1997 WL 174314, at *1 (6th Cir. Apr. 14, 1997) ("[i]n effect, the Federal Credit Union Act created a localized and liberalized system of federal credit services * * * [that enabled] the federal government to make credit available to millions of working class Americans")

(quoting *TI Federal Credit Union* v. *DelBonis*, 72 F.3d 921, 931-932 (1st Cir. 1995)).

Far from being designed to limit development of credit unions, therefore, the common bond requirement was intended to jump-start credit unions. Congress perceived that credit unions would be formed more quickly if existing groups with common interests and relationships could be induced to pool their resources. The common bond requirement ensures the ready formation of credit unions and their continuing economic viability as institutions able to provide people across the country with an alternative source of financial services. Congress did not intend the common bond requirement to secure a competitive advantage for banking institutions.

B. The Court Of Appeals' "Suitable Challenger" Analysis Unwarrantedly Expands The Zone Of Interests Test

Although it acknowledged that banks are not "intended beneficiaries" of the common bond provision, see Pet. App. 23a, the court of appeals nonetheless held that banks are "suitable challengers" to enforce the FCUA's common bond requirement because there is "a reason to think" that the banks' interest in "patrolling a statutory picket line will bear *some* relation to the congressional purpose" underlying the statute. *Id.* at 28a (emphasis added). The court of appeals' standing determination thus permits plaintiffs to bring claims not only when the pertinent statutory provision evinces no clear purpose to benefit them, but also, paradoxically, when Congress gave every indication that its statutory purpose was to fill a commercial void caused because entities of the plaintiffs' type disdained serving the very persons Congress sought to benefit through the legislation. Furthermore, the banks assert standing as challengers to

the NCUA's interpretation not to deny any person or group access to membership in a federal credit union, but rather to regulate *which* credit unions different groups may join.

1. The court of appeals' holding is incompatible with the Court's zone-of-interests cases. This Court has required that a plaintiff demonstrate that Congress intended to protect the plaintiff's commercial interests in the statutory provision, the violation of which formed the legal basis for the complaint. See, *e.g.*, *Bennett*, 117 S. Ct. at 1167 (The provision of Endangered Species Act requiring each agency to "use the best scientific and commercial data available" when proposing action to protect endangered species was "intended to prevent uneconomic (because erroneous) jeopardy determinations [and] [p]etitioners' claim that they [were] victims of such a mistake is plainly within the zone of interests that the provision protects."); *Clarke*, 479 U.S. at 403 (The commercial interest asserted by the trade association, whose members compete with banks in providing discount brokerage services, was within the zone of interests of provisions of the National Bank Act limiting locations in which banks can have branches since the point of those provisions was, in part, to "limit[] the extent to which banks can engage in the discount brokerage business."); *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 155-156 (1970) (Data processing companies had standing as competitors to contest the legality of a ruling by the Comptroller of the Currency permitting national banks, as an incident to their banking services, to make data processing services available to other banks and to bank customers, because the plaintiffs' commercial interest specifically was sought to be protected by the anti-competition limitation contained in Section 4 of the Bank Service Corporation Act of 1962,

Pub. L. No. 87-856, 76 Stat. 1132.). The banks, therefore, must show that Congress intended to protect their interests when it promulgated the common bond requirement in the FCUA. Yet nothing in the language or history of the common bond provision evinces an intent to protect banks from competition with credit unions.

Contrary to the D.C. Circuit's approach, this Court's cases have eschewed any endorsement of the "suitable challenger" test adopted by the D.C. Circuit. In *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517 (1991), unions representing postal employees challenged a decision by the United States Postal Service to permit private companies to engage in certain mailing practices, a decision the plaintiffs claimed violated the postal monopoly created by the Private Express Statutes (PES). Using an analysis similar to the one it employed below in this case, the D.C. Circuit in *Air Courier* had upheld the unions' standing to sue because "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." 498 U.S. at 524 (quoting *American Postal Workers Union, AFL-CIO* v. *United States Postal Serv.*, 891 F.2d 304, 310 (D.C. Cir. 1989) rev'd, 498 U.S. 517 (1991)). This Court rejected that view as "mistaken, for it conflates the zone-of-interests test with injury in fact." 498 U.S. at 524. Instead, the Court stated, it must inquire "as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." *Ibid*. The Court found no evidence that the statutes were intended for the benefit of the putative plaintiffs, *id*. at 524-525, and concluded that the plaintiffs lacked standing. The Court further noted that nothing in its decision in *Clarke* had changed

the longstanding principles upon which "zone-of-interests" standing should be analyzed. See, *e.g.*, 498 U.S. at 523-524, 529. The court of appeals' "suitable challenger" doctrine cannot be squared with the Court's analysis of zone-of-interests standing in *Air Courier*.

2. The court below also misunderstood the legislative history of the FCUA by concluding that the common bond requirement was, "[l]ike more classic entry restrictions," intended to be a "limitation[] on growth" that effectively restricts the size of credit unions. Pet. App. 24a. The court thus viewed it as appropriate to permit banks to help enforce Congress's intent. In so doing, however, the court held an insupportable view of the common bond provision as an entry restriction. The term "common bond" is a broad one, and does not require that credit unions be small entities. Congress was well aware when it passed the FCUA in 1934 that some state credit unions had grown sufficiently large that personal knowledge of every borrower's character was impossible. See *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933) (statement of Roy F. Bergengren) (noting that Boston's Telephone Workers Credit Union had 16,000 members). See also 78 Cong. Rec. 7259 (1934) (remarks of Sen. Barkley) (credit unions "have been the means by which small groups of people and even larger groups of people within an industry or within an establishment have been able to establish their own credit facilities * * * [w]ithout being subject to the outrageous rates of loan sharks and others who prey upon people of that class").

Consistent even with the interpretation of the common bond provision advanced by respondents in the courts below, some credit unions today have thousands of members located throughout the United States and overseas.

Examples of such large, single-group credit unions include those formed by members of a particular branch of the military or employees of a single large corporation or organization. See, *e.g.*, NCUA, *Financial and Statistical Database* (Dec. 1996) (http://www.ncua.gov/cgiwin/cureports.exe) (Navy Federal Credit Union—more than 1.6 million members; American Airlines Federal Credit Union—more than 157,000 members). Nothing in the lower court's decision on the merits calls into question the legal validity of such credit unions, yet their existence casts great doubt on the court of appeals' assumption that the common bond requirement was a "statutory picket line" (Pet. App. 28a) to restrict the growth of individual credit unions.

Indeed, given the legal existence of large, single-group credit unions, it would be anomalous to infer that Congress intended the common bond provision to restrict the activities of credit unions over a carefully circumscribed market segment. Quite apart from the lack of any evidence of such a purpose, the court's decision directly conflicts with Congress's aim of promoting the rapid expansion of credit unions across the country so that persons not being served by banks could obtain credit relief. The common bond requirement facilitated that process by encouraging groups having a common bond to form credit unions. Consequently, the lower court's interpretation of the common bond requirement's purposes—to limit credit unions while protecting banks—is illogical. See *Branch Bank*, 786 F.2d at 626 (rejecting suggestion that common bond provision was "a congressionally mandated fetter on the operation of the Act designed to 'protect competitors'").

C. Other Suitable Plaintiffs With Standing To Sue Exist

"The assumption that if [plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Thus, even if no other potential plaintiff had standing to sue for an allegedly erroneous interpretation or application of the common bond provision, the banks would still lack standing. If that were the case, the banks' lack of standing would simply mean that Congress has committed the issue to the political process for resolution, *ibid.*, a process in which banks are hardly without influence. See *Branch Bank*, 786 F.2d at 626.

In any event, there are other potential plaintiffs who would have standing to challenge the NCUA's actions under the APA. The statutory text and legislative history demonstrate that the intended beneficiaries of the common bond provision are the very credit union members whose interests the requirement was designed to protect. Obviously, "[i]f the NCUA were seen to violate the common bond requirement to the detriment of union members, they would possess standing to sue." *Branch Bank*, 786 F.2d at 626. Credit union members are fully capable of bringing their own challenges to expansions that they believe deprive the credit union of the common bond necessary to ensure success. See, *e.g.*, *Casazza* v. *Department of Commerce*, 350 N.W.2d 855 (Mich. Ct. App. 1984) (seven members of state credit union challenged decision of Michigan's state agency having control over state credit unions to approve bylaw amendment for Ann Arbor Co-op Credit Union that significantly expanded union's field of membership).[10] Banks simply do

[10] Credit union members and directors have sued to challenge field-of-membership determinations by the NCUA. See, *e.g.*, *Board of*

not occupy a similar position. *Branch Bank*, 786 F.2d at 626. Accordingly, the decision by the court below should be reversed and the case dismissed because respondents have no standing under the APA to challenge the NCUA's charter amendment decisions in this case.

II. THE NCUA'S SELECT GROUP POLICY IS BASED ON A REASONABLE READING OF THE FEDERAL CREDIT UNION ACT

If, contrary to our submission above, the Court concludes that the lower courts properly entertained this suit, the judgment below should nonetheless be reversed because the court of appeals misapplied *Chevron* in failing to defer to the NCUA's reasonable interpretation of the FCUA's common bond provision. The *Chevron* decision requires that courts undertake a two-step process in reviewing an agency's interpretation of a statute it is entrusted to administer. The first step is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If the intent of Congress is clear, courts must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. However, if "the court determines Congress has not directly addressed the precise question at issue"—"if the statute is silent or ambiguous"—then "the question for the court is whether the agency's answer is based on a permissible construction." *Id.* at 843.

Directors & Officers, Forbes Fed. Credit Union v. *NCUA*, 477 F.2d 777 (10th Cir. 1973) (directors challenged NCUA's narrow interpretation of field-of-membership provision of credit union's charter); *National Alliance of Postal & Fed. Employees* v. *Nickerson*, 424 F. Supp. 323 (D.D.C. 1976) (national labor organization representing approximately 40,000 postal workers challenged NCUA's refusal to grant federal credit union charter because of potential overlap with United States Postal Service Federal Credit Union).

As this Court has emphasized, in upholding the agency's interpretation, a "court need not conclude that the agency construction was the only one it permissibly could have adopted * * *, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." 467 U.S. at 843 n.11. It need only be a "reasonable choice within a gap left open by Congress." *Id.* at 866. Moreover, an agency's interpretation is entitled to deference even though it may represent a revision of prior views. See *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal * * * since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency."). Agencies are not required to "establish rules of conduct to last forever"; rather, they must have "ample latitude to adapt their rules and policies to the demands of changing circumstances." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks omitted). See generally *Rust* v. *Sullivan*, 500 U.S. 173, 186-187 (1991).

A. The Common Bond Provision Is Ambiguous In Defining The Field of Membership In Federal Credit Unions

1. By limiting federal credit union membership to "*groups* having a common bond of occupation or association," 12 U.S.C. 1759 (emphasis added), the FCUA does not unambiguously prohibit the possibility that membership in a federal credit union may consist of more than one employee group, each with its own common bond. The reference to "a common bond" can apply as readily to each of the groups within the credit union as to all of those groups together. The court of appeals

initially appeared to recognize the ambiguity in the statutory language: "the plural noun 'groups' could refer * * * to multiple groups in a single FCU," or "to each of the groups that forms a credit union." Pet. App. 6a. See *First City Bank*, 1997 WL 174314, at *8 (Jones, J., dissenting) ("The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement."). And in rejecting the parties' constructions of the statute, the court below noted that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in [a federal credit union]." Pet App. 6a. Notwithstanding its seeming recognition of the statute's ambiguity, however, the court ultimately concluded that Congress left no doubt as to the meaning of the common bond provision.

2. As a grammatical matter, the phrasing "groups having a common bond" supports three reasonable interpretations in the context of a federal credit union's membership: (1) a single group may have a single common bond; (2) multiple groups may each have their own common bonds; and (3) multiple groups may have a single common bond. See generally *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (construction is "mandated" by "the grammatical structure of the statute"). The phrase "having a common bond" is a participial phrase that describes the noun "groups." When a single group comprises the members of a federal credit union, it would be natural to describe that group as "having a common bond." Yet when multiple groups compose the credit union's membership, the singular adjectival form, "having a common bond," is necessarily

ambiguous, because it could describe the "groups" individually or collectively.[11]

In failing to appreciate the inherent ambiguity of the participial phrase used by Congress, the court below and the Sixth Circuit in *First City Bank* committed another grammatical mistake by finding the phrase "groups having a common bond" analogous to the adjoining field-of-membership limitation phrase, "groups within a well-defined neighborhood, community, or rural district." See Pet. App. 8a-9a; *First City Bank*, 1997 WL 174314, at *6. Both courts read the two phrases in the statute as though they had the same syntactical structure (*i.e.*, plural groups followed by a singular phrase). See *ibid*. That reading, however, misunderstands the different parts of speech employed in the two phrases. The phrase "groups having a common bond" is an example of a noun being described with a participial phrase. The phrase "groups within a well-defined neighborhood," on the other hand, is a prepositional phrase that imposes a limit on the noun. The word "within" used as a preposition means "in the inner part or interior of, inside of, in," or "with emphasis on the restriction or confinement by limits or boundaries: In the limits of, not outside or beyond." 12 *The Oxford English Dictionary* 222 (1933). Whereas a participial phrase will be used to describe the noun to which it is attached, the prepositional phrase in

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[11] Nor is the example of this phrasing unique to the FCUA. The meaning of the phrase "groups having a common surname" is ambiguous as to whether all of the groups or each group individually must have the same surname. The same is true for the following examples using other participial phrases: "groups sharing a common cause of action"; "groups displaying a common hairstyle"; and "groups speaking a common language." See generally H.W. Fowler & F.G. Fowler, *The King's English* 119 (1931) (describing improper participial phrases as "one of the blunders most common" in English usage).

Section 1759 shows the relationship of the noun "groups" to the object of the preposition, "a well-defined neighborhood." Thus, it is syntactically sound to interpret the neighborhood provision as requiring that all constituent groups be within a single geographical area, because the prepositional phrase serves as a limit on the noun "groups." It is also syntactically sound to construe the occupational provision as permitting each group to be characterized by its own common bond, because the participial phrase "having a common bond of occupation" describes the "groups" either individually or collectively.[12]

Certainly Congress could have chosen a clearer method of expressing its intent. The phrase "groups, each of which must have its own common bond," would be as clear in one direction as "groups, all of which must share a single common bond," would be in the other. But the statutory language chosen by Congress conveys no such clarity, and that inherent ambiguity leaves open reasonable interpretations enabling the regulatory agency to adapt to changing social and economic circumstances.[13]

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[12] In demonstrating the ambiguity of the phrase "groups having a common bond" it is important to note that putting the participial phrase in the plural form (*i.e.*, "groups having common bonds") is not necessarily a solution to the ambiguity in the statute. The plural form does not clarify the ambiguity created by the singular form, because it is no more certain whether the "common bonds" must characterize each group or all of the groups in a credit union. Indeed, the plural form merely introduces yet another ambiguity into the text: whether the members of each constituent group must have more than one common bond. In selecting a participial phrase to serve as the adjective to a plural noun, Congress necessarily created ambiguity.

[13] The ambiguity of the common bond provision was recognized by the General Counsel of the Farm Credit Administration as early as 1940, when he wrote that "[p]lainly[,] the expression 'groups having a common bond of occupation, or association,' does not by its own terms define itself with sufficient particularity to facilitate its application in all of the situations in which its application may be necessary." FCA Gen. Counsel, Legal Op. No. 754-A (Sept. 24, 1940), at 1.

3. The disparate views of the parties, the courts below, and the majority and dissent in *First City Bank* belie the court of appeals' ultimate conclusion that the language of the common bond provision is unambiguous. Similarly, the fact that the court below and the Sixth Circuit in *First City Bank* do not share a common interpretation of the language further suggests that Congress did not speak unambiguously with respect to the common bond provision. See *Smiley*, 116 S. Ct. at 1732-1733 (in light of different views on meaning of statutory term reflected in multiple dissents and conflicting opinion from another court, "it would be difficult indeed to contend that the [relevant statutory term] is unambiguous with regard to the point at issue").

Indeed, the only way the court below could discern a lack of ambiguity in the statute was to introduce three terms not found in the textual phrase "groups having a common bond of occupation or association": "In sum, the FCUA requires by its terms that all *members* of a credit union *share* a *single* common bond." Pet App. 10a (emphasis added). By reformulating the statutory text, therefore, the court's decision underscores that the language in the statute itself does not unambiguously answer the precise question of whether Congress intended to prohibit federal credit union membership based on multiple occupational groups. The court thus erred in not assessing the reasonableness of the NCUA's interpretation under a *Chevron* step two analysis.

B. The NCUA's Construction Is A Reasonable Interpretation Of The Statutory Language

If this Court agrees with petitioners that the statutory language is ambiguous, it must uphold the NCUA's interpretation. The respondent banks have argued in this case only that the statutory language is unambiguous; they have not challenged the reasonableness of the NCUA's construction in the event the statute is found to be ambiguous. See Pet. App. 6a, 23a. The NCUA's interpretation of the common bond provision is consistent with the language of the statute.

1. The statute's use of the plural form of the word "group" is sufficient, in and of itself, to support the NCUA's judgment that the membership of a federal credit union may have more than one group. Thus, viewed as a limit on membership, the term "groups" makes clear that more than one group can form a federal credit union.

That reading of the pertinent phrase draws further support from the language of the opening portion of Section 1759, which establishes that Congress's reference to "Federal credit union membership" was intended to refer to membership in a single credit union that might include multiple "groups." Section 1759 begins by specifying that "Federal credit union membership" shall consist of "the incorporators and such other persons and * * * organizations" who shall "subscribe to at least one share of *its* stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors." 12 U.S.C. 1759 (emphasis added). The word "its" refers back to the term "credit union" as used in the initial phrase, "Federal credit union membership." Those requirements apply to a single credit union. When Congress later referred to "groups" in Section 1759 in the context of "Federal credit union membership," it

similarly intended to embrace a single federal credit union. There is no reason to think that Congress used the phrase in any different manner when it set forth the common bond requirement later in the same sentence. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Accordingly, it was entirely reasonable for the NCUA to read the common bond provision to permit "a credit union" to be composed of several member groups, each with its own common bond.

Given that the statute permits, but does not require, multiple groups within a single federal credit union, the NCUA has reasonably interpreted the phrase "a common bond" to apply to each of those groups, rather than necessarily across the multiple groups that may compose the credit union's field of membership. Just as the statute does not read "groups, each of which has a common bond," it also does not read "groups that together share a single common bond," as the court of appeals essentially held.

2. In finding the NCUA's interpretation "unconvincing," the court of appeals erroneously concluded that the term "common bond" as used in the FCUA would be rendered "surplusage" by the agency's construction. See Pet. App. 6a-7a. The court's analysis is flawed in several respects.

First, relying on a dictionary definition of "group" as "an 'assemblage . . . having some resemblance or common characteristic,'" the court concluded that "a common bond is implicit in the term 'group.'" Pet. App. 7a (quoting *Webster's New Int'l Dictionary* 955 (1927) (definition 4)). Another definition from the same dictionary, however, contains no such requirement of commonality in its definition of "group": "An assemblage of per-

sons or things regarded as a unit because of their comparative segregation from others; a cluster; aggregation; as, a *group* of trees or of islands." *Webster's New Int'l Dictionary* 955 (definition 3). Thus, a group can simply mean "a cluster," or an "aggregation." *Ibid.* By contrast, a "bond" connotes a more substantial connection between individuals—a "uniting" or "cementing" force. 1 *The Oxford English Dictionary* 981 (1933); accord *Webster's*, *supra*, at 251 (a "bond" is "[a] binding force or influence," or "a uniting tie"). Under the NCUA's interpretation, the requirement that group members have a "common bond" is *in addition* to their being part of a "group." To join an occupational credit union under the NCUA policy, a group must show not just that it is defined by an occupational characteristic, but that its members are connected to one another in a relationship sufficiently substantial to qualify as a "common bond." The agency's interpretation thus gives meaning to "groups" and "common bond," and renders neither term redundant.[14]

Second, the court's construction neglects other important words in the statutory provision. For example, if "a common bond is implicit in the term 'group,'" and all members "must share a common bond," Pet. App. 7a, then all members of a federal credit union ultimately must be members of a single encompassing group. But the FCUA limits federal credit union membership to "*groups* having a common bond of occupation or association." 12 U.S.C. 1759 (emphasis added). The

[14] The NCUA's regulations expressly recognize the difference between the characteristics that may define a group, and those that satisfy the common bond provision. Thus, the agency does not permit a federal credit union to represent, for instance, "[p]ersons employed or working in Chicago, Illinois," because such an occupational group is insufficiently defined. See IRPS 94-1, 59 Fed. Reg. at 29,076.

court suggested that "the plural noun 'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union." Pet. App. 6a. The statutory text and the context in which it appears make clear that more than one group can join a single federal credit union.

Finally, the fact that the statute limits community federal credit union membership to "groups within a well-defined neighborhood, community, or rural district," 12 U.S.C. 1759, does not support the lower court's conclusion that the statute is unambiguous. See Pet. App. 9a. The NCUA interprets that provision to restrict a community federal credit union's field of membership to a single geographical area, but not to preclude multiple groups in a single community-based credit union. The agency's construction stems from the requirement that a community-based federal credit union serve groups "within" a well-defined locale, and not because the word "groups" means something different in the common bond provision than in the community field-of-membership provision.[15]

3. The common bond provision is a precondition, but not a guarantee, of federal credit union membership. As the statute provides in Section 1754, the NCUA (as did its predecessors) has discretion to grant a request for a charter only if the prospective credit union applicant can demonstrate the "economic advisability" of granting the charter. See 12 U.S.C. 1754. Section 1759 specifically

[15] The NCUA's chartering standards also contain special provisions to facilitate service to low-income groups. Those provisions permit a non-contiguous low-income group to join a community credit union, and include a more expansive common bond standard to enable occupationally-based credit unions to provide service to such groups, which otherwise would have difficulty obtaining credit. See NCUA, *Chartering and Field of Membership Manual* 1-17 to 1-19 (1994).

confers discretion on the regulating agency to fix the "rules and regulations" determining the requirements for federal credit union membership. 12 U.S.C. 1759. In light of that specific rulemaking authority, it is especially appropriate for the courts to defer to the agency's reasonable construction of the overall common bond phrase contained in Section 1759, just as the courts must defer to the agency's determination of whether the interests advanced by prospective members are sufficiently strong to constitute a "common bond," because that term is not defined in the statute. See, *e.g.*, *Chevron*, 467 U.S. at 843-844; *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977).

C. The NCUA's Interpretation Promotes The Congressional Purposes Expressed In The FCUA

Congress enacted the FCUA to promote a "form of credit organization capable of reaching the masses of the people." S. Rep. No. 555, *supra*, at 3. The FCUA also was designed to "promote the growth of credit unions" and "enhance credit union stability." See *Community First Bank* v. *NCUA*, 41 F.3d 1050, 1054 (6th Cir. 1994). The NCUA's multiple employee group policy directly advances those goals by permitting employees of small businesses to gain access to credit union services even though they might not have enough potential members to establish a viable stand-alone institution and by ensuring that a single credit union will not be unduly dependent upon the fortunes of a particular company or industry. The court of appeals' decision, by contrast, thwarts the attainment of those statutory goals.

Notwithstanding the legislative history documenting the congressional purpose of enhancing the growth potential of federal credit unions, the court below believed that too much growth would hamper the ability

of a credit union to "be a cohesive association," and thus negate a key distinction between banks and credit unions, the latter of which "could 'loan on character.'" Pet. App. 11a (quoting *First National Bank*, Pet. App. 22a). But the court failed to recognize that the NCUA's select employee group policy achieves that objective, because only employees of carefully selected employers may join a federal credit union. IRPS 89-1, 54 Fed. Reg. at 31,169. Moreover, the common bond requirement continues to ensure that, unlike a bank, a federal credit union may not open an account for any individual who seeks the credit union's services. Instead, only individuals who are part of qualifying groups under the NCUA's field-of-membership terms are entitled to credit union services. See *United States* v. *Michigan*, 851 F.2d 803, 807 (6th Cir. 1988) ("Whereas almost all private business will serve any customer, the 'customers' of each federal credit union, its members, are expressly 'limited to groups having a common bond.'") (quoting 12 U.S.C. 1759).

Second, the court of appeals' analysis (Pet. App. 11a) of the growth in size of certain multiple-group credit unions misunderstands the FCUA and its legislative history. By its own terms, the FCUA places no limitation on the size of a federal credit union, and Congress was fully aware of that fact when it passed the statute in 1934. See *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 15 (1933). Thus, as we demonstrated in discussing the standing issue (see pages 20-23, 25-27, *supra*), to the extent the common bond requirement is viewed as a "restriction" on federal credit unions, its purpose is to ensure the financial viability (and not to limit the expansion) of them. That purpose is aided, not hindered, by the NCUA's multiple group policy, particularly given the numerous small businesses whose

employees otherwise face considerable obstacles to obtaining credit union services. According to recent Bureau of the Census data, approximately 56% of all workers employed in the United States (approximately 78 million) aged 15 years and older are employed in a firm that has fewer than 500 employees. See United States Dept. of Commerce, Bureau of the Census, *1996 Statistical Abstract of the United States* 430. Under the court of appeals' ruling, the ability of workers in such enterprises to join federal credit unions under the existing NCUA policy would be thwarted, because the NCUA has determined that credit unions of less than 500 members are unlikely to be economically viable. See NCUA, *Chartering and Field of Membership Manual* 1-12 (1994).

Third, in concluding that the common bond requirement was intended to ensure that all members of a credit union "are known by the officers and by each other" (Pet. App. 11a), the court's emphasis on members knowing each other is anachronistic. Modern technology and the widespread availability of credit information have greatly lessened the necessity for lending officials to be personally acquainted with a borrower to evaluate his or her credit-worthiness or the likelihood that a loan will be defaulted. As interpreted by the NCUA, the common bond requirement serves an important purpose by ensuring that each group within a particular credit union has a cohesive link among its members. That link strengthens the commitment of group members to the success of the credit union. The NCUA's policy simply does not require that there be a single link binding together all of the members of the various groups composing a credit union.

Finally, the NCUA's 1982 modification of the common bond policy was a legitimate response to the volatile

economic conditions of the late 1970s and early 1980s that dramatically slowed the rate of growth for all financial institutions, but especially for credit unions. Burger & Dacin at 29. The revision of the common bond policy allowed groups to join existing credit unions if they did not have the number of members necessary to make an individual credit union economically feasible. In that way,

> [t]he revision protected against two potential problems. First, it allowed credit unions to shield themselves from the economic consequences of wide-spread layoffs or plant closings of a particular employer. Second, it allowed credit unions to create economies of scale to provide services to its members in the most cost effective manner available. Without the more expansive interpretation of the common bond provision many credit unions would have failed, and many other groups would not have been able to attain credit union services. These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means.

First City Bank, 1997 WL 174314, at *11 (Jones, J., dissenting).

D. The NCUA's Reasonable Interpretation Is Entitled To Deference

1. Because of the ambiguity of the statute, the reasonableness of the NCUA's interpretation, and the congruity of that interpretation with the congressional purposes underlying the FCUA, the court below erred in not deferring to the agency under a *Chevron* step two analysis. Under *Chevron*, 467 U.S. at 843, "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with

the enforcement of that statute." *Clarke*, 479 U.S. at 403 (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626 (1971)). The court of appeals nonetheless concluded that it "[was] not required to grant any particular deference to the [NCUA's] parsing of statutory language or its interpretation of legislative history" when attempting to discern congressional intent "from the statutory text and the purpose of the statute." Pet. App. 6a (quoting *Rettig* v. *Pension Benefit Guaranty Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984)). This Court, however, has rejected the proposition that *Chevron* deference is inapplicable to "a pure question of statutory construction" and to the agency's interpretation of the purposes underlying the statute. *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987). See also *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) ("If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.' ").

Moreover, even though the court of appeals maintained that this case fell "under step one of *Chevron* only," Pet. App. 6a, it used a *Chevron* step two analysis. The court rejected as unconvincing the syntactical arguments made by the parties. *Ibid*. Then it determined that "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an FCU." *Id*. at 7a. Finally, it concluded that the two phrases, "groups having a common bond of occupation" and "groups within a well-defined neighborhood, community, or rural district," must be interpreted in a consistent way. *Id*. at 8a-9a. Those conclusions, however, are not *compelled* by the words and syntax of the statute. The view that one reading of the term "common bond" makes more sense

than another, or that the terms of the occupational and community-based clauses should be interpreted consistently, "go[es] to the reasonableness of the NCUA's interpretation of the statute rather than to a consideration of whether the words of the statute are clear on their face." *First City Bank*, 1997 WL 174314, at *8 (Jones, J., dissenting). Thus, the court of appeals improperly substituted its construction of the FCUA for a reasonable one made by the agency charged with administering the statute.

2. The reasonableness of the NCUA's interpretation is further supported by the pattern of Congress's action in the wake of the NCUA's 1982 interpretive revision. From the inception of the NCUA's revised common bond interpretation, Congress has been made aware of the agency's policy by the NCUA itself, lobbyists on behalf of the banking industry, and the General Accounting Office (GAO).[16] Despite amending the FCUA numerous times

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[16] See, *e.g.*, *Annual Report of the National Credit Union Administration* 1 (1982), C.A. App. 527; Callahan Letter, *supra*; *Community Investment Practices of Credit Unions: Hearings Before the Subcomm. on Consumer Credit and Ins. of the House Comm. on Banking, Fin. and Urban Affairs*, 103d Cong., 2d Sess. 121 (1994) (testimony of Richard L. Mount on behalf of the Independent Bankers Association of America, complaining that, since 1989, the NCUA "has been unraveling" the common bond requirement, "expand[ing] the common bond rule to permit virtually unlimited membership"); *id.* at 179 (testimony of C. Kendric Fergeson on behalf of the American Bankers Association, objecting to "competitive advantages of credit unions and the erosion of the common bond," which have increased their "ability to compete with banks"); *Unrelated Business Income Tax: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 1883 (1987) (comments of the American Bankers Association, objecting to NCUA's expanded application of the common bond requirement as unfair because it "allow[ed] credit unions to compete with banks and savings and loans for

since 1982, Congress has never altered the text of the common bond provision.[17]

The legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, illustrates

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customers among the general public," and complaining that the common bond requirement already "had been loosely interpreted for many years before [1982]"); *Revenue Increase Options: Hearings Before House Comm. on Ways and Means*, 100th Cong., 1st Sess. Pt. I, at 507 (1987) (testimony of Gerald B. Franceski, The Bankers Committee for Tax Equality, expressing his perception that "the deterioration of 'common-bond' requirements for credit union membership [that] allow credit unions to compete with banks and savings and loans for customers among the general public"); GAO Report at 218-219.

[17] See Act of Jan. 12, 1983, Pub. L. No. 97-457, §§ 25-29, 96 Stat. 2510-2511; Secondary Mortgage Market Enhancement Act of 1984, Pub. L. No. 98-440, § 105(b), 98 Stat. 1691 (Oct. 3, 1984); Housing and Community Development Technical Amendments Act of 1984, Pub. L. No. 98-479, § 206, 98 Stat. 2234 (Oct. 17, 1984); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, §§ 701-716, 101 Stat. 652-656 (Aug. 10, 1987); Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub L. No. 101-73, Tits. IX, XII, 103 Stat. 446, 519 (Aug. 9, 1989); Support for East European Democracy (SEED) Act of 1989, Pub. L. No. 101-179, § 206, 103 Stat. 1310 (Nov. 28, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, Tit. III, 103 Stat. 864 (Nov. 9, 1989); Crime Control Act of 1990, Pub. L. No. 101-647, Tit. XXV, 104 Stat. 4859 (Nov. 29, 1990); Federal Deposit Insurance Corporation (FDIC) Improvement Act of 1991, Pub. L. No. 102-242, §§ 251, 313, 105 Stat. 2331, 2368 (Dec. 19, 1991); Housing and Community Development Act of 1992, Pub. L. No. 102-550, §§ 1501- 1504, 1604-1605, 106 Stat. 4044-4051, 4081-4084 (Oct. 28, 1992); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2854, 107 Stat. 1908 (Nov. 30, 1993); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320606, 108 Stat. 2119 (Sept. 13, 1994); Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994).

Congress's awareness of and response to concerns that the NCUA had impermissibly broadened the scope of the common bond requirement in its 1982 revision. Section 1201 of FIRREA directed that the GAO study the credit union system, specifically ordering an examination of "whether the common bond rules regarding credit union membership continue to serve their original purpose." See 12 U.S.C. 1752a note. Congress requested that the report "contain a detailed statement of findings and conclusions, including recommendations for * * * legislative action." *Ibid.*[18]

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[18] A prior version of that provision included language directing the GAO to examine whether "the common bond rules regarding credit union membership continue to serve their original purpose *and the extent to which recent interpretations of such rules may have contributed to the growth of credit unions*." See H.R. 1278, 101st Cong., 1st Sess. (1989) (emphasis added). The italicized language was removed prior to passage of the legislation. Banking industry representatives complained at hearings on H.R. 1278 about the breadth of the NCUA's interpretation of the common bond requirement. See *Financial Institutions Reform, Recovery, and Enforcement Act of 1989—(H.R. 1278): Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. Pt. II, at 66 (1989) (*FIRREA Hearings*) (statement of Thomas Rideout, president of the American Bankers Association). Other banking industry representatives expressed "the increasing[ ] concern[s] about the role of credit unions as tax exempt depository institutions serving an ever-enlarging marketplace outside traditional 'common-bond' constraints." *FIRREA Hearings*, *supra*, at 236 (statement of the Association of Reserve City Bankers, an association of the highest-ranking executives from the Nation's major banking institutions, discussing its concerns about inequities between credit unions and other depository institutions). See also *Budget Implications and Current Tax Rules Relating to Troubled Savings and Loan Institutions: Hearings Before the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 308 (1989) (statement of Thomas Rideout alleging that "[m]ajor changes during the 1970's and 1980's have eroded the

The General Accounting Office (GAO) issued its report in 1991. See *Credit Unions: Reforms for Ensuring Future Soundness* (July 1991) (GAO Report). The report highlighted the NCUA's 1982 policy change and stated that "[f]or the first time, credit unions could have members with different common bonds." *Id.* at 219; see also *id.* at 215 (stating that "common bond requirements have been loosened considerably" and that "groups with very different common bonds are permitted to belong to a single credit union"). In its recommendations to Congress, the GAO suggested (*id.* at 231 (emphasis added)):

> If credit unions are to remain distinct from other depository institutions because, in part, of their common bond membership requirement, and if this requirement is intended to further the safe and sound operation of credit unions[,] * * * [then] Congress should consider stating this general intent in legislation and setting forth guidelines on the limits of occupational, associational, and community common bonds, as well as the purpose and *limits of multiple group charters*. These guidelines should be for all federally insured credit unions.

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uniqueness of credit unions in * * * key areas: * * * erosion of the common bond expanded membership so it can be as broad as anyone over the age of 50"); *Problems of the Federal Savings and Loan Insurance Corporation [FSLIC]: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 101st Cong., 1st Sess. Pt. IV, at 473, 477 (1989) (propounding written questions to credit union representatives to elicit responses to "[c]oncerns" that "recent regulation[s] issued by the NCUA have made the 'common bond' requirement meaningless").

In 1991 Congress passed the Federal Deposit Insurance Corporation (FDIC) Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236. The Senate Report to that legislation contains several references to the GAO Report. None of the GAO's recommendations concerning the common bond requirement, however, were mentioned in that Senate Report.[19]

Indeed, Congress has amended the FCUA in five different laws enacted since publication of the GAO Report. See note 17, *supra*. In none of them has Congress altered the NCUA's interpretation of the common bond requirement in any way. "[A] refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *United States* v. *Riverside Bayview Homes, Inc.*, 474

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[19] Among the recommendations of the GAO cited in the Senate Report, which the FDIC Improvement Act ultimately did not include, were that "areas relating to [credit union's] regulation and insurance * * * can be improved," "minimum capital levels be established for credit unions," "credit unions be required to expense their 1 percent deposit over a period of years," "federally-insured credit unions be permitted to invest in corporate credit unions only if they are also federally-insured," "the NCUA establish loans-to-one-borrower limits and minimum capital requirements for corporate credit unions," and "reduce[] the Central Liquidity Fund's borrowing authority." S. Rep. No. 167, 102d Cong., 1st Sess. 200-202 (1991). Additionally, the Senate Report explained that provisions in the FDIC Improvement Act governing credit unions were made "along the lines recommended by the GAO [in *Reforms for Ensuring Future Soundness*]" and that "[t]hese changes will strengthen safety and soundness while continuing to recognize that credit unions are unique among depository institutions." *Id.* at 201.

U.S. 121, 137 (1985). See also *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 599-601 (1983).

Accordingly, not only did the court err in conferring standing on respondents, it also erred in holding that the NCUA's interpretation of the statute was impermissible.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

1. Whether banks that compete for customers against federal credit unions, and the banks' trade association, have standing to challenge decisions of the National Credit Union Administration permitting federal credit unions to expand their fields of membership in violation of the "common bond" requirement of the Federal Credit Union Act, 12 U.S.C. § 1759.

2. Whether the "common bond" requirement is violated when an "occupational" federal credit union accepts members who have no "common bond of occupation" with the existing membership.

PARTIES TO THE PROCEEDINGS

The appellees in the court of appeals were the National Credit Union Administration; AT&T Family Federal Credit Union; and the Credit Union National Association.

The appellants in the court of appeals were First National Bank and Trust Company; Lexington State Bank; Piedmont State Bank; Randolph Bank and Trust Company; Bankers Trust of North Carolina (which had previously merged into Triad Bank, a state chartered bank headquartered in Greensboro, North Carolina, which is the successor in interest to Bankers Trust of North Carolina); and the American Bankers Association.

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STATEMENT

This case concerns the meaning of Section 109 of the Federal Credit Union Act, 12 U.S.C. § 1759. Section 109 limits membership in federal credit unions to "groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."

For nearly fifty years, the National Credit Union Administration ("NCUA") and predecessor agencies

interpreted the "common bond" limitation in Section 109 to mean that all members of any one federal credit union must share a *single* "common bond." In 1982, however, NCUA adopted a new policy in the case of "occupational" federal credit unions. It allowed occupational credit unions to have a "field of membership" comprised of an unlimited number of unrelated occupational groups. NCUA Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982) and IRPS 82-3, 47 Fed. Reg. 26,808 (1982). Pursuant to its new policy, NCUA permitted the AT&T Family Federal Credit Union ("ATTF") to add more than 150 unrelated occupational groups across the nation, so that members of ATTF concededly do *not* share a single common bond of occupation. NCUA has permitted similar expansions by other federal credit unions.

Respondents—banks who compete with ATTF, and a national trade association of banks—filed this suit against NCUA in 1990, alleging that NCUA's policy and its approval of ATTF's expansions violated the common bond requirement. In 1993, the court of appeals held that respondents had standing to bring the suit. Pet. App. 15a,[1] *cert. denied sub. nom. AT&T Family Fed. Credit Union v. First Nat'l Bank & Trust Co.*, 510 U.S. 907 (1993). In 1996, the court of appeals ruled in favor of Respondents on the merits. Pet. App. 1a. The case is here on petitions for *certiorari* by NCUA and intervenors ATTF and the Credit Union National Association ("CUNA," a credit union trade association).

A. Factual and Regulatory Background

Federal credit unions are mutually owned financial institutions chartered and regulated by NCUA pursuant to the Federal Credit Union Act. They are authorized to provide a broad range of ordinary banking services, including deposit

[1] All citations to "Pet. App." refer to NCUA Pet. No. 96-843.

accounts (technically, the sale of "shares"), checking-account-like services, and common sorts of consumer loans and mortgages. Credit union services are generally limited to members, who must qualify for membership under the "common bond" limitation (in the case of "occupational" or "associational" credit unions) or the geographic limitations (in the case of "community" credit unions) of Section 109. Federal credit unions compete for customers ("members") with banks and thrift institutions, state-chartered credit unions, and other financial institutions such as loan companies.

Federal credit unions have been accorded by Congress a number of competitive advantages as compared with other federally chartered financial institutions, on account of their character as mutual benefit institutions restricted to a limited membership.[2] For example, federal credit unions, unlike banks and thrifts (including mutual thrift institutions), are exempt from state and federal taxes, 12 U.S.C. § 1768, and federal credit unions are exempt from a variety of regulatory requirements applicable to banks and thrifts such as the Community Reinvestment Act, 12 U.S.C. § 2902.

Congress adopted the Federal Credit Union Act ("FCUA") in 1934, Pub. L. No. 467, 48 Stat. 1216 (codified at 12 U.S.C. § 1751 *et. seq.*), against a background of State credit union initiatives and Congress's adoption of the District of Columbia Credit Union Act in 1932, Pub. L. No. 190, 47 Stat. 326. The stated general purpose was to provide a federal charter and federal supervision for institutions "typical" of those being formed under State charter, S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934), without "any new form of practice or procedure," 77 Cong. Rec. 3206 (1933) (Sen. Sheppard). Congress's understanding of the existing models for credit

[2] Credit union members generally have "well above average income," and are more likely to own a home and be employed than are others in the population at large. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness* ("GAO Study") 224 (1991).

union organization was based largely on the work of Roy Bergengren, a pioneer of the credit union movement, principal draftsman of the model credit union statute on which the 1934 Act was based, and the sole witness during the Senate hearings.[3] During the debate over the 1932 District of Columbia Credit Union Act, Congress considered competitive concerns raised by the commercial banking industry, since the credit unions would be operating under a more favorable structure, and it made various changes to the proposed legislation in response. *See* 75 Cong. Rec. 5738 (remarks of Sen. Dickinson); 5964 (remarks of Sens. Dickinson and Blaine); 7889 (voting on amendments) (1932). Competitive concerns were likewise raised and resolved in connection with consideration of the Federal Credit Union Act. *See, e.g., Credit Unions: Hearing Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933) ("1933 Hearing") 20; 78 Cong. Rec. 12224 (remarks of Rep. Luce) (1934).[4]

From the outset, Congress's model of federally chartered credit unions included the "common bond" restriction on membership as a key element. As Bergengren said in his testimony during the Senate hearing: "every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group. . . . Therefore a credit union first, as I have said, is a bank which is organized within a specific group of people." 1933 Hearing at 15. In general, Bergengren was of the view that the common bond was vital to the sound functioning of a credit union because the link among members enabled the credit

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[3] *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking & Currency*, 73d Cong., 1st Sess. (1933).

[4] Administration of the Federal Credit Union Act was initially entrusted to the Farm Credit Administration, and then to a succession of three other agencies, before being transferred to NCUA in 1970. Act of Mar. 10, 1970, Pub. L. No. 206, §6, 84 Stat. 49.

union to have the knowledge necessary to "loan on character" to any member and the constant presence necessary to be effective in collecting such loans. Id. at 26. The common bond limitation on membership was included as Section 9 of the Bill initially proposed, S. 1639, 73d Cong., 1st Sess. (1932), and was enacted as Section 109 of the FCUA without substantive change.[5]

Congress has never altered Section 109's common bond limitation on occupational credit union membership. In 1968 and in 1977, Congress amended the Act to add the provisions, currently codified at 12 U.S.C. §§ 1757(13) and (14), allowing a healthy federal credit union to purchase loans and other accounts of a troubled credit union whose members did not share a common bond with the members of the healthy credit union, Pub. L. No. 375, § 1(3), 82 Stat. 284 (1968); Pub. L. No. 22, § 303(e), 91 Stat. 49 (1977) (codified at 12 U.S.C. § 1757(14)), but Congress specifically noted that these changes were *not* to be "interpreted as a means for the merger of credit unions with dissimilar common bonds"[6] and that the purchasing "credit union could not extend additional financing to the borrower unless he was within the common bond of the

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[5] Apart from the expressed intent of Congress to authorize only credit unions that were "typical" of those then known, and the implications of the statute itself, Congress "did not . . . express the reason for the [common bond] requirement," GAO Study at 217. NCUA has suggested that Congress's main purpose for the common bond was that it would be easier for organizers to gather people to start up a credit union if the group was already defined by some kind of common bond. *E.g.*, NCUA Br. 7. Congress never said so. Moreover, the argument does not explain why Congress insisted on the common bond as an *absolute limitation* on membership, or why Congress insisted that the common bond limit apply throughout the life of the credit union and not merely to the organizing period. In fact, the statute's limitations on credit union membership constitute the one area explicitly withdrawn from rulemaking authority.

[6] H.R. Rep. No. 23, 95th Cong., 1st Sess. 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 116.

purchasing credit union."[7] Later, in 1982, Congress authorized the emergency merger of insured credit unions that had different common bonds, but only upon a determination by NCUA that a credit union was failing, that an emergency required expeditious supervisory action, and that no other alternative was reasonably available. *See* 12 U.S.C. § 1785(h). Congress authorized supervisory mergers under this provision in response to a specific request for legislation from NCUA, whose Chairman testified that, without it, "[w]e can't combine credit unions with unlike fields of membership."[8] Congress has not authorized mergers of federal credit unions with unlike fields of membership in any other circumstances.

Each of the four predecessors to NCUA, and NCUA itself for twelve years, understood the common bond limitation in Section 109 to require that all members of an occupational credit union share a single common bond—in general, that they all be associated with the same firm (or related firms).[9] In 1982, NCUA announced a new membership policy, the policy challenged in this suit, providing that an occupational credit union may have a field of membership composed of an unlimited number of unrelated employer groups so long as each separate group within the credit union has a "common bond" of its own that separates it both from the public at large and from the rest of the credit union's membership. IRPS

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[7] S. Rep. No. 1265, 90th Cong., 2d Sess (1968), *reprinted in* 1968 U.S.C.C.A.N. 2469, 2471.

[8] *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. Pt. I, at 109 (1981) (statement of Chairman Connell).

[9] Pet. App. 3a. For some time NCUA has taken the position that employees of firms all located in the same building, industrial park, or shopping center may join together in a credit union on the ground that they share a single common bond. *See* NCUA, *Organizing a Federal Credit Union* 3 (Sept. 1972); 45 Fed. Reg. 8285 (1980).

82-1, 47 Fed. Reg. 16,775, IRPS 82-3 Fed. Reg. 26,808 (1982). *See* IRPS 94-1, 59 Fed. Reg. 29,066, 29,075-76 (1994). No explanation of the legal basis for this new policy was released at the time. In 1983, in a letter to the Chairman of the House Banking Committee, NCUA's Chairman formally advised Congress of the new policy, and justified it on two grounds. J.A. 43-45. First, NCUA stated, although without citation to authority, that it "did not appear to be the intent behind the Federal Credit Union Act" to deny credit union membership to groups that were too small to support a credit union on their own. Second, NCUA stated that multiple-employer credit unions were necessary to deal with cases in "hard economic times" in which "[c]redit unions that served only one employer or one industry could be forced into liquidation." *Id.* at 44. NCUA's explanation did not refer to the 1982 amendments to the Act made by Congress, at NCUA's request and upon its view that it lacked statutory authority to "combine credit union with unlike fields of membership," to deal with credit union liquidations and mergers of failing credit unions.

One credit union that exploited NCUA's new policy was the AT&T Family Federal Credit Union in North Carolina. ATTF was chartered in 1952 with a field of membership limited to "Employees of the Radio Shops of Western Electric Company, Inc., who work in Winston-Salem, Greensboro, and Burlington, North Carolina; employees of this credit union; members of their immediate families; and organizations of such persons." Charter No. 7840, Radio Shops Federal Credit Union (original charter of ATTF). After NCUA revised its membership policy in 1982, it approved a series of expansions to ATTF's field of membership to add employees of a Coca-Cola bottler, a Pepsi-Cola bottler, Black & Decker Corp., Duke Power Co., the American Tobacco Co., and a large number of other firms. By the time the court of appeals addressed the merits here, ATTF had "grown to have 112,000

members in more than 150 disparate occupational groups spread across all 50 states." Pet. App. 4a-5a. Approximately 65% of ATTF's members today are not employees of AT&T or affiliates. NCUA Br. 9. Under NCUA's policy, ATTF is eligible to add an unlimited number of additional unrelated occupational groups throughout the country to its membership.[10]

B. Proceedings Below

Respondents are four North Carolina banks and the American Bankers Association, the principal national trade association for the banking industry. In 1990, respondents filed suit against NCUA in the U.S. District Court for the District of Columbia, alleging that the multiple-common-bond policy violates the FCUA, and asking, among other things, for relief against NCUA approvals of ATTF's additions of new employer groups. The complaint alleged that the individual bank plaintiffs, and members of the Association, were injured by the operation of NCUA's policy. ATTF and CUNA, its trade association, were permitted to intervene.

In 1991, the district court dismissed, ruling that, although Respondents had constitutional standing, they lacked "prudential standing." Pet. App. 32a-42a. The court of appeals reversed. It agreed that there was no issue of constitutional standing ("that [plaintiffs] will suffer competitive or economic injury is not in doubt," *id.* at 20a), and it held that respondents satisfied the requirements for prudential standing as well. Id. at 15a-31a.

The court of appeals' decision on standing noted that the common bond limitation is a congressionally imposed limit on credit union activity: "Like more classic entry restrictions,

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[10] ATTF's current authorized membership, which includes groups added even after the court of appeals decision below, and appears now to include many more than 150 constituent groups, is set forth at J.A. 54-78.

the common bond requirement, by limiting a credit union's customer base, effectively prevents the credit union from offering its services and competing in a broader market." Id. at 24a-25a. The court of appeals then held that, under this Court's precedents, competitors have standing to enforce such a limit. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); and *Association of Data Processing Servs. Orgs. v. Camp*, 397 U.S. 150 (1970). The court of appeals read these cases as standing for "the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions." Pet. App. 24a. In reaching this conclusion, the court of appeals specifically noted that this Court allowed securities dealers or their trade association to enforce competitive restrictions imposed on banks by the Glass-Steagall Act and the McFadden Act, even though those statutes were not meant "to insulate investment bankers . . . from competition." Pet. App. 23a, *citing Clarke*, 479 U.S. at 398 & n.13; and *ICI*, 401 U.S. at 618-19.

On remand, on cross-motions for summary judgment on the merits, the district court upheld NCUA's policy on the common bond limitation as "reasonable." Pet. App. 54a. The court of appeals again reversed the district court, unanimously holding that the common bond provision requires that all the members of any one federal credit union must have a single common bond. This construction, the court found, is required by the text of the statute strictly limiting credit union membership to "a common bond" (which NCUA's interpretation "would drain . . . of all meaning") and the Act's purpose "to unite credit union members in a cooperative venture." Id. at 10a, 12a (brackets and citations omitted). The court of appeals' opinion paid particular attention to the relationship between the "common bond" clause ("credit union membership shall be limited to groups having a common

bond of occupation") and the functionally parallel "community" clause ("or to groups within a well-defined neighborhood, community, or rural district") whose membership NCUA agreed is limited to a single community. The court of appeals reasoned that the two parallel clauses should be read consistently: thus, credit unions of either kind may include more than one group, but all of the constituent groups within a single credit union must have a single common bond of occupation or be within a single geographic community. The court accordingly found NCUA's construction, under which a single occupational credit union could serve an unlimited number of employer groups with disparate occupational bonds, to be impermissible. Id. at 14a.

While a substantially identical case was pending before the Sixth Circuit, this Court granted certiorari. Then, in April 1997, a divided panel of the Sixth Circuit rendered a decision in that case. *First City Bank v. NCUA*, 111 F.3d 433 (6th Cir.), *petition for cert. filed* (No. 96-2018) (June 23, 1997). In accord with the D.C. Circuit, the Sixth Circuit also held that NCUA's policy was unlawful, largely persuaded by the parallel between occupational "common bond" credit unions and "community" credit unions, and the recognition that "if NCUA's interpretation is accepted, it would make the common bond requirement meaningless." *Id.* at 438-49.

SUMMARY OF ARGUMENT

Standing. Respondents compete with credit unions for customers who need deposit, loan, and other financial services. Banks are injured when, as here, NCUA authorizes a credit union to sign up customers ("members") in violation of the statutory limitations on a credit union's "field of membership"—here the statutory requirement that all members of an occupational credit union share a single common bond. As the D.C. Circuit and the Sixth Circuit have held, the competitive injury suffered by banks means that they

are "aggrieved by agency action within the meaning of a relevant statute" under Section 10 of the Administrative Procedure Act, and therefore have standing to challenge the NCUA action.

This conclusion flows from a long series of competitor standing decisions by this Court. *Clarke v. Securities Industry Association*, 479 U.S. 388 (1987) is typical. Securities firms were permitted in *Clarke* to sue the Comptroller of the Currency to challenge his decision permitting a national bank to operate discount brokerage offices at places where the bank could not establish a branch. The securities firms claimed that the Comptroller's actions violated the McFadden Act, which limits the branching powers of national banks. This Court held that the securities firms had standing because they were "competitors who allege an injury that implicates the policies" of the McFadden Act's limitations on national banks. *Id.* at 403. Precisely the same thing is true here: Respondents are competitors of the credit unions who allege an injury that implicates the policies of the FCUA's common bond limitation. Indeed, the Chairman of NCUA in 1981 described the common bond limitation as "our McFadden Act."[11]

These competitor standing cases reflect, among other things, the fact that Congress over the past 60 years has for a variety of reasons segmented the market for financial services, granting certain powers and imposing certain restrictions on different kinds of financial institutions. Commercial banks have broad deposit-taking and lending authority, and their customers are protected by federal deposit insurance, but they cannot underwrite corporate securities; securities firms have unlimited securities powers but cannot take deposits; thrifts are encouraged by tax and other laws to make mortgage loans for residential housing; credit unions do not pay federal taxes and are not covered by the Community Reinvestment Act or

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[11] 1981 Hearings at 109 (Statement of Chairman Connell).

certain other laws, but the membership of a credit union is limited by the common bond requirement.

NCUA makes a fundamental challenge to the competitor standing cases by proposing that this Court hold that only those for whose specific benefit the statute at issue was passed (here, NCUA would say, credit unions themselves) have standing. This is wrong in fact and wrong in principle. NCUA is wrong in fact in asserting that Congress was not concerned with the competitive impact on banks when it passed the FCUA in 1934. For example, in hearings on the predecessor of the FCUA, the 1932 District of Columbia Credit Union Act, the competitive concerns of banks were aired and changes responsive to these concerns were made in the D.C. legislation; these changes were carried forward to the FCUA. NCUA is wrong in principle because major legislative acts are invariably the product of multiple purposes and competing interests. *See Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1997). Of course, one purpose of the FCUA was to promote credit unions, but its very text ("except that Federal credit union membership shall be limited" by the common bond requirement) shows that Congress had in mind other purposes too, including specific limitations on credit union expansion. Given the multiplicity of purposes, it makes no sense to say that only credit unions can sue NCUA to enforce the FCUA. *Clarke* itself held that "there need be no indication of congressional purpose to benefit the would-be plaintiff," 479 U.S. at 399-400; if there were such a requirement, *Clarke* and other cases would certainly have come out the other way, because the notion that Congress passed the McFadden Act or the Glass-Steagall Act specifically to benefit the securities industry is absurd.

The Merits. As both courts of appeals that considered the issue have held, Congress has spoken directly to the precise question presented here, and has required that the members of an occupational credit union share a single common bond.

That conclusion flows from any common-sense review of the text, purpose, and legislative history of Section 109 of the FCUA.

Section 109 begins with a general delegation of authority to NCUA to adopt rules governing membership in a federal credit union, and then specifically limits NCUA's authority with an "except" clause:

> ...except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within an well-defined neighborhood, community, or rural district.

12 U.S.C. § 1759. It is hard to imagine why Congress "limited" federal credit union membership in this way if it did not intend that the members of each occupational credit union had to share a single common bond. The contrary interpretation—the one now advanced by NCUA—reads the common bond limitation out of the statute, for it permits a single credit union to serve all employed persons in the United States simply by listing all their employers, one after another. ATTF is well down that road, with more than 150 disparate occupational groups and members in all 50 states. Pet. App. 4a-5a.

The legislative history is entirely in accord with the text of the statute. NCUA cites nothing showing that Congress intended that a single credit union could string together multiple common bonds. To the contrary, the Senate Report on the FCUA described a credit union as "a cooperative society...limited in each case to the members of a specific group with a common bond of occupation or association...." S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). In this it echoed the testimony of Roy Bergengren, the preeminent credit union crusader, who told the Senate Banking Committee that "a credit union first ... is a bank which is organized within a specific group of people" which may be large, but

which is "confined to the employees" of a single company. 1933 Hearing at 15.

For fifty years, NCUA and its predecessors were of the view that Section 109 required the members of an occupational credit union to share a single common bond. On precisely this ground NCUA in 1982 sought and obtained from Congress an amendment to the FCUA permitting it to approve the merger of a failing credit union into a healthy credit union notwithstanding the common bond limitation. NCUA told Congress it needed the amendment because the common bond limitation meant that "We can't combine credit unions with unlike fields of membership." *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. Pt. I, at 109 (1981) ("1981 Hearings") (Statement of Chairman Connell). Congress passed the amendment *limited to failing credit unions*. NCUA cannot square this history with its position in this case.

NCUA bases its argument principally on the word "groups" in Section 109 (membership is "limited to groups having a common bond of occupation"), contending either that the "s" in "groups" means that Congress authorized credit unions with multiple common bonds, or that the "s" creates an ambiguity on the issue. The courts of appeals rejected this assertion in light of the clear expression of congressional intent and the fact that, as NCUA agrees, members of a credit union can share a single common bond of occupation, even if they might be said to comprise different groups (for example, enlisted personnel, officers, and civilians employed at a military base; employees of a parent company and those of its subsidiaries). In addition, NCUA's reliance on the word "groups" in the occupational credit union clause of Section 109 is undermined by its own interpretation of the word "groups" in the community credit union clause, which limits membership in community credit unions to "groups within a

well-defined neighborhood, community, or rural district." NCUA has always conceded, as it must, that the word "groups" in the community credit union clause does not allow it to roll one community after another into a single, nationwide credit union. As both courts of appeals held, the same must be true for an occupational credit union governed by the functionally parallel clause—and no amount of discussion of participial and prepositional phrases can change that conclusion.

At bottom, NCUA struggles to find ambiguity (and thus deference) in a statute that is plain. If NCUA is right as a matter of policy that marketplace and technological developments render the common bond requirement inappropriate, it needs new legislation, just as the Federal Reserve needed legislation when it tried, for what it considered sound policy reasons, to apply its rules to nonbank-banks in the *Dimension* case. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

ARGUMENT

I. RESPONDENTS HAVE STANDING TO CHALLENGE NCUA'S APPLICATION OF THE COMMON BOND REQUIREMENT.

A. Under Well-Established Principles, Competitors Have Standing to Challenge Federal Agency Decisions Authorizing Financial Institutions To Expand Beyond Their Prescribed Market.

Section 109's limitations on credit union membership constitute the principal line drawn by Congress prescribing the universe in which credit unions may provide services in competition with commercial banks. Within these limits Congress also imposed further restrictions, such as those on the particular services that credit unions may offer to

customers. *See generally* 12 U.S.C. § 1757. But the limitation on membership is the principal restriction because it affects all credit union services: credit unions are generally forbidden to offer any banking services to persons other than members. These limits on credit union activities are part of the federal government's systematic organization and regulation of the financial markets.

Respondents' standing to challenge NCUA's action authorizing ATTF to breach this statutory restriction is governed by Section 10 of the APA, which grants standing to any person "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. The APA's "generous review provisions," require only that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *ADAPSO v. Camp*, 397 U.S. 150, 156, 153 (1970), *quoted in Clarke v. Securities Industry Association*, 479 U.S. 388, 395 (1987). The zone of interests test is "not meant to be especially demanding." *Clarke*, 479 U.S. at 399.

The court of appeals held that Respondents have standing to challenge NCUA's approval of ATTF's providing services to persons who do not share its original common bond of occupation, on the basis of this Court's decisions in cases such as *ADAPSO*, *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970), *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971) ("*ICI*"), and *Clarke*. Those cases held that the limits Congress placed around banks' lawful activities gave securities firms and other financial institutions standing to challenge the federal bank regulators' approvals for banks to provide services allegedly in violation of those limits. As the court of appeals put it, "We take from [the *ADAPSO-Clarke* line of] cases the principle that a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the

alleged loosening of those restrictions. . . ." Pet. App. 24a. This Court has routinely decided many comparable challenges to agency action involving the financial services industry without any apparent qualms about standing,[12] and the continuing vitality of these competitor standing decisions has been repeatedly confirmed, *see, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997). Since announcing the "zone of interests" test in *ADAPSO*, this Court has never denied standing to a competitor challenge of this kind.[13]

In *Clarke*, for example, a trade association of securities dealers challenged decisions of the Comptroller of the Currency allowing national banks to operate discount

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[12] *See Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46 (1981) (open-end investment companies' challenge to Board regulation allowing bank holding companies to act as investment advisors to closed-end mutual funds); *United States Nat'l Bank v. Independent Ins. Agents of America*, 508 U.S. 439 (1993) (challenge to Comptroller ruling allowing banks located in small communities to sell insurance by mail to people outside such communities); *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (challenge to Comptroller ruling allowing banks to serve as agents in sale of annuities).

[13] The courts of appeals have routinely found standing for competitor challenges under *Clarke* and its predecessors. *E.g., UPS Worldwide Forwarding, Inc. v. United States Postal Service*, 66 F.3d 621 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996) (private firm has standing as competitor to challenge Postal Service's operation of International Customized Mail system); *Community First Bank v. NCUA*, 41 F.3d 1050 (6th Cir. 1995) (banks have standing to challenge NCUA approval of credit union expansion allegedly in violation of Section 109 membership limitations); *Securities Industry Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989) (securities dealers have standing as competitors to challenge the Comptroller's decision to allow banks to sell mortgage pass-through certificates); *Board of Trade of Chicago v. SEC*, 883 F.2d 525 (7th Cir. 1989) (futures markets have standing as "rivals for investors' custom" to challenge the SEC authorization of new trading system); *DeLoss v. HUD*, 822 F.2d 1460 (8th Cir. 1987) (owners of rental property have standing as competitors to challenge HUD decision to subsidize housing project).

brokerage offices at places other than permissible bank branches. The securities dealers contended that the Comptroller's decisions violated the McFadden Act, which restricts certain national bank activities to authorized branch offices, and limits the geographical locations at which branches may be established. 479 U.S. at 392-93. Congress clearly did not pass the McFadden Act for the purpose of benefitting securities dealers, but the Court concluded that they had standing under the "zone of interests" test because they were "competitors who allege an injury that implicates the policies of the National Bank Act." *Id.* at 403. As NCUA concedes in its brief,

> [t]he commercial interest asserted by [securities dealers, who] compete with banks in providing discount brokerage services, was within the zone of interests of provisions of the National Bank Act limiting locations in which banks can have branches since the point of these provisions was, in part, to "limit[] the extent to which banks can engage in the discount brokerage business."

NCUA Br. 23. Likewise here, Respondents are within the zone of interests of provisions of the FCUA limiting the persons to whom credit unions may provide services as members, since the point of those provisions is, in part, to limit the extent to which credit unions can serve such persons as members.

Similarly in *ICI*, the Court held that securities dealers had standing to challenge decisions of the Comptroller allowing banks to provide certain pooled investment services to customers in alleged violation of the Glass-Steagall Act (part of the Banking Act of 1933). There was no pretense in *ICI* that the Glass-Steagall Act was adopted in order to protect the securities firms from competition with banks. On the contrary, the opinion is quite clear that the Act's purpose was

to protect the stability of the banks themselves and to protect customers by limiting the extent to which banks underwrite securities, a business Congress then believed to be risky and prone to conflicts of interest. This Court held that the securities dealers had standing to challenge the bank activities because Congress had "arguably legislated" against banks engaging in the particular activities constituting "the competition that the petitioners sought to challenge, and from which flowed their injury." 401 U.S. at 620. No more is required. As the *Clarke* Court noted in commenting on *ICI*:

> Justice Harlan, in dissent, complained that there was no evidence that Congress had intended to benefit the plaintiff's class when it limited the activities permitted national banks. The Court did not take issue with this observation; it was enough to provide standing that Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs by entering the investment company business.

479 U.S. at 398.

The analysis of standing here precisely follows the analysis in *ICI*. In the FCUA's common bond provision, Congress at least "arguably legislated" that occupationally defined federal credit unions must limit their services to members sharing a single common bond. We do not know Congress's complete or precise purposes for doing this, as the court of appeals found, Pet. App. 3a, 21a, and NCUA concedes. But even if its primary purpose were to strengthen credit unions themselves, and benefit their members, as in *ICI*, Respondents have standing because the action that Congress "arguably legislated" against is precisely what constitutes "the competition that [Respondents have] sought to challenge, and from which flowed their injury." 401 U.S. at 620.

NCUA ignores *ICI* in its discussion of standing, but it does argue that the competitor standing precedents are inapplicable because they concern limitations on growth aimed at restricting the size of competing firms, whereas the "'common' bond [restriction] . . . does not require that credit unions be small entities." NCUA Br. 25-26. This argument does not respond to anything that the court of appeals said, or to any pertinent issue. No one contends here that credit unions must be "small entities," any more than the plaintiffs in *ADAPSO, Arnold Tours, ICI,* and *Clarke* contended—or were required to contend, in order to establish their standing—that banks have to be "small entities." Neither this case, nor any of those cases, involves limitations on an institution's absolute size.[14] What they do involve is recognizing one financial institution's standing, under the "zone of interests" analysis, to challenge agency action permitting another type of financial institutions to expand beyond the limitations Congress imposed on it. The policing of these competitive boundaries is critically important in the financial industry, where Congress replaced free entry among all participants with a system of highly regulated and specialized institutions. Here, as in the prior cases, Respondents have a direct substantive interest in challenging regulatory action that breaches those boundaries in order to protect themselves from competition that Congress intended to preclude by making it unlawful.

For these reasons, NCUA has it exactly backwards when it argues, NCUA Br. 24, that Respondents' position here is contrary to *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991). In *Air Courier*,

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[14] *See* 1933 Hearing at 15 (Bergengren testimony) ("Therefore, a credit union first, as I have said, is a bank which is organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. It is, however, confined to the employees of the New England Telephone & Telegraph Co.").

unions representing Postal Service employees sought to challenge the Postal Service's suspension of its monopoly over international express mail delivery because they believed that the statute threatened their jobs. The statute in question, like the statute here, defined operational limits on competition among competing firms in an industry. It was not, however, a labor relations measure. Thus the Court, specifically citing with continuing approval the "series of cases in which we have held that competitors of regulated entities have standing to challenge regulations," *id.* at 529, held that the labor union plaintiffs did not have standing *because they were employees rather than competitors:*

> The [statutes at issue] are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury.

Id. at 528 n.5. In this case Respondents are unlike the inadequate employee challengers in *Air Courier* precisely because they *do have* the "competitive and direct injury" that justifies "competitors of regulated entities having standing to challenge regulations."

B. Standing Does Not Require an Explicit Statement by Congress That the Common Bond Restriction Was Enacted for the Benefit of Banks.

The general purpose of the Federal Credit Union Act is to provide for a system of credit unions that is federally chartered and regulated, just as the general purpose of the National Bank Act is to provide for a system of federally

chartered and regulated banks. Each of the two statutes, like any important federal enactment, is the result of a deliberative process involving the accommodation of a variety of judgments and interests. In each case, the statute reflects congressional intentions not only generally to foster the establishment and health of these financial institutions, but also to impose definite limits on their activities and organization. For example, the National Bank Act, designed to establish healthy and vigorous national banks across the country, at the same time limits the geographical expansion of individual banks (the McFadden Act) and their securities powers (the Glass Steagall Act). The Federal Credit Union Act's common bond requirement is similarly an explicit limitation on credit unions' license. NCUA has specifically described the common bond restriction to Congress as "our McFadden Act."[15]

NCUA contends that Respondents should not be allowed to challenge the Agency's actions allowing credit unions to breach the common bond limitation, even though doing so gives credit unions new advantages in competing with Respondents and plainly injures Respondents, because the overall purpose of the Act in general is to facilitate the development of credit unions, and the overall purpose of the common bond limitation was to channel credit union organization in a safe and effective way. That argument is wrong because it misstates the applicable legal principles; and it is wrong because NCUA oversimplifies and mischaracterizes the multiple considerations involved in the enactment of the Federal Credit Union Act.

As to the applicable legal principles: NCUA routinely misstates the requirements of the "zone of interests" analysis. That banks are "nowhere mentioned in Section 1759," NCUA

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[15] *See* 1981 Hearings at 109. The full passage is quoted below at page 40.

Br. 18, is not important to the inquiry, or else the claims in *Clarke, ICI, Arnold Tours,* and *ADAPSO* would all have come out the other way. Similarly, the Endangered Species Act contains no reference to ranchers or others in their shoes, but they have standing to challenge agency actions going beyond the bounds of the statute. *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

NCUA also asserts that Respondents cannot have standing here because the legislative history of the FCUA does not "suggest that it was intended for the benefit of the banking industry." NCUA Br. 19. But this Court's jurisprudence has never required Congress to make a list, in the statute or legislative history, of all those it intends to benefit. Indeed, this Court in *Clarke* was at pains to point out that "in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." 479 U.S. at 399-400. And in *ICI,* the securities industry had standing to raise a Glass-Steagall challenge, even though Congress in passing that Act clearly viewed the securities business as the problem that warranted legislation, not the beneficiary of the legislation. Similarly, in *Arnold Tours v. Camp*, 400 U.S. 45 (1970), travel agents had standing to challenge the Comptroller's decision to allow banks to provide travel services to customers. In so holding, as the Court later noted in *Clarke*, "The Court found it of no moment that Congress never specifically focused on the interests of travel agents in enacting § 4 of the Bank Service Corporation Act." 479 U.S. at 396, n.10. The contrary idea advanced by NCUA, that the plaintiff's specific type of institution must be particularly mentioned in the legislative history, would lead to the absurd result that the most outrageous breaches of congressional purpose would be incontestable if Congress did not think it necessary to address them explicitly in the legislative process.

The FCUA is generally intended to foster the development of credit unions—but only up to a limit. Congress did not intend to foster any credit union operations, no matter how beneficial such operations might be to particular prospective credit union members or to the balance sheets of particular credit unions, in violation of that limit. As the statute establishes absolutely, Congress intended that the place for occupational federal credit unions in our financial system should not expand beyond the common bond limit—just as the place for national banks did not extend beyond the locations allowed by the McFadden Act, or the activities allowed by the Glass Steagall Act or other authorized powers.

Thus, the nature of the statute's absolute restrictions on credit unions' business itself shows that competitor institutions are at least "*arguably* within the zone of interests protected" by that restriction to justify standing here, just as in *ICI*, *Clarke*, *ADAPSO*, and *Arnold Tours*. *See, e.g.*, *Bennett v. Spear*, 117 S. Ct. at 1168 (finding it "readily apparent" from the statute's face that one purpose of a provision requiring use of the best data available in implementation of the Endangered Species Act was to "avoid needless economic dislocation."). Under the principles laid down in these cases, the Court need look no further than the face of the common bond restriction to find standing here.

As to the legislative history: The history of the Federal Credit Union Act shows that the competitive interests of banks *were* among Congress's concerns when it enacted the Federal Credit Union Act.

During the early 1930's, in an effort to deal with the Depression, Congress refashioned the structure of the entire financial system by segmenting the industry into separate classes of institutions to serve different functions through the exercise of carefully limited powers. Securities firms, whose whole regulatory structure was revised in the Securities Act of 1933 and the Securities Exchange Act of 1934, were permitted

to underwrite and deal in corporate securities but were forbidden to take deposits, Pub. L. No. 66, 48 Stat. 189 (1933); commercial banks retained broad lending and deposit taking authority but were limited in the securities services they could offer to the public under the Banking Acts of 1933 and 1935, *id.*; Pub. L. No. 305, 49 Stat. 709 (1935); federal savings associations were accorded only limited commercial lending powers, while significant tax incentives were applied to encourage mortgage loans under the Home Owners' Loan Act, 12 U.S.C. § 1464 (c)(2)(A), 48 Stat. 132 (1933); credit unions were authorized to provide limited services to a narrow membership, and forbidden to do business with the public at large, under both the District of Columbia Credit Union Act of 1932, and in the FCUA of 1934.

Congressional concerns that chartering credit unions could inflict an unwanted competitive injury on the commercial banking industry are reflected as early as the hearings on the District of Columbia Credit Union Act of 1932, the forerunner of the FCUA. Bankers in the District of Columbia testified that the proposed credit unions would be a substantial source of competition, and argued for amendments to limit the competitive advantages that credit unions would enjoy. *Hearings Before the Senate Committee on the District of Columbia on S. 1153, a Bill to Provide for the Incorporation of Credit Unions in the District of Columbia*, 72d Cong., 1st Sess. 25-38 (1932). There was significant concern, in view of the weakened state of the banking industry, about the wisdom of too strong a wave of competition from credit unions. As Senator Kean observed, for example, "I agree with the President that we ought to go very slowly with anything that will interfere with the banks at the present time." *Id.* at 31. The resulting bill included not only an analogue to the 1934 Act's common bond limitation (which was included even in the first proposal), but in addition other changes that were directly responsive to these competitive

concerns. *See* 75 Cong. Rec. 5738 (remarks of Sen. Dickinson); 5964 (Senators Dickinson and Blaine); 7889 (voting on amendments) (1932).

With this background, it is not surprising that Mr. Bergengren, began his presentation at the 1933 hearings by admitting that a credit union "is a bank" but immediately diminishing the concern of unwanted competition by emphasizing "in the first place" the common bond limitation: "[E]very credit union is organized within a limited and given group of people. And it may have to do only with the members of that group." 1933 Hearing at 15. The importance of this limitation, as we discuss more fully below in connection with the merits, was echoed repeatedly throughout the legislative history. *See infra* at 43-47. Moreover, as Congress's deliberations proceeded, the problem of competitive injury to the remaining banks, and banks' concerns about credit unions, were raised and addressed on more than one occasion. *See, e.g.*, 1933 Hearing at 20 (Sen. Goldsborough's concern about "opposition on the part of commercial banks"); 78 Cong. Rec. 12224 (1934) (Rep. Luce addressing whether credit unions would "interfere with" banks). The concessions to banks' competitive concerns that were made during the debates over the District of Columbia statute in 1932 were all adopted as part of the nationwide statute, as was the common bond limitation.[16]

In short, while we do not contend that concern for banks' competitive interests was Congress's main concern, there is simply no basis for NCUA's assertion that Congress did not have banks' competitive stake in mind. It was not necessary to *debate* these competitive issues in connection with the

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[16] *Compare* Pub. L. No. 467 §§ 7(6) and (8), 9, 48 Stat. 1216 (1934) (provisions in FCUA) *with* Pub. L. No. 190, 47 Stat. 326 (identical provisions in D.C. Act). The FCUA was modeled on the D.C. Credit Union Act. 1933 Hearing at 29; 78 Cong. Rec. 7259 (remarks of Sen. Sheppard).

FCUA in 1934, because they had already been addressed in the 1932 District of Columbia legislation, and the changes made in that legislation were carried forward to the nationwide statute; in addition, the credit union proponents already favored the common bond limitation for reasons of their own.

As this Court's decisions repeatedly emphasize, major legislative acts are invariably the product of multiple purposes, concerns, and compromises. *See, e.g. Bennett*, 117 S. Ct. at 1168 (finding the provision at issue to have not only one "obvious purpose," but also "another objective," reflecting countervailing concerns, which supported plaintiffs' standing); *Clarke*, 479 U.S. 388, 410-417 (1987) (Stevens, J., concurring in part and concurring in the judgment) (competitors were within the zone of interest protected by the McFadden Act, since the Act represented a "compromise" between different interests); *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action."). Thus, while one impetus for the common bond provision may have been to strengthen credit union organizations themselves, the only fair reading of the purposes "implicit in the statute," and its legislative history, *Clarke*, 479 U.S. at 399, is that the potentially competitive relationship between credit unions and existing banking institutions was a companion concern in Congress's legislative process as well. That is more than sufficient to establish that plaintiffs are "arguably within the zone,"[17] under the APA's "generous review provisions."[18]

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[17] *ADAPSO*, 397 U.S. at 153, *quoted in Bennett v. Spear*, 117 S.Ct. at 1161; *Clarke*, 479 U.S. at 396 .

[18] *ADAPSO*, 397 U.S. at 156 (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)), *quoted in Bennett v. Spear*, 117 S. Ct. at 1161;

(continued...)

II. SECTION 109 LIMITS MEMBERSHIP IN EACH OCCUPATIONAL FEDERAL CREDIT UNION TO A SINGLE COMMON BOND OF OCCUPATION.

The court of appeals below analyzed the common bond requirement under the *Chevron* standards, and concluded that Section 109 of the FCUA requires that all members of an occupational credit union share a single common bond. The Sixth Circuit reached the same conclusion. *First City Bank v. NCUA*, 111 F.3d 433 (1997). We show below that this conclusion fully conforms with *Chevron* and its progeny, and was required here by the language and structure, purpose, and legislative history of the Act.

A. An Agency's Interpretation of a Statute Must Conform To Congress's Dictate.

The starting point for analyzing an agency's interpretation of a statutory provision is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Determining whether Congress has directly spoken to an issue involves the "traditional tools of statutory construction." *Id.* at 843 n.9: The court examines the language of the statute at issue, as well as the structure of the Act, and its legislative history. *See, e.g., Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (relying on plain language, structure, and legislative history of statute); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112 (1987) (relying on words, structure, and legislative history of statute). As the Court explained in *Dole v. United Steel*

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[18] (...continued)
Clarke, 479 U.S. at 395.

Workers of America, "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 494 U.S. 26, 35 (1990) (internal quotations omitted).

There are circumstances in which Congress has not directly spoken to an issue by expressly delegating to an agency authority to fill in a gap in a statute, or by implicitly delegating authority to the agency through silence or its use of ambiguous terms (*e.g.*, "public convenience and necessity"). *Chevron*, 467 U.S. at 843-44. In those circumstances, the court need only determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. But this deference to the agency interpretation is appropriate only if the court first concludes that Congress has not spoken to the issue. *See Dimension Fin. Corp.*, 474 U.S. at 374 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."); *Dole*, 494 U.S. at 42-43 ("Because we find that the statute, as a whole, clearly expresses Congress's intention, we decline to defer the OMB's interpretation.").

In this instance, NCUA argues that its interpretation of Section 109 is "reasonable" and promotes Congress's general intent to foster credit unions, and that a contrary reading of the statute is "anachronistic" and does not take into account "[m]odern technology and the widespread availability of credit information." NCUA Br. 40. Such arguments, even if they were defensible on policy grounds, are relevant only if the Court first concludes that Congress has not spoken to the issue. If, as Respondents maintain, and two courts of appeal have held, Congress *has* directly spoken to the issue, then NCUA cannot interpret away what it thinks are "anachronistic" limitations. An agency "has no power to correct flaws that it perceives in the statute it is empowered to administer." *Dimension Fin. Corp.*, 474 U.S. at 374.

Congress did not delegate to NCUA authority to fill in a gap in the statute in this case. The relevant part of Section 109 is a specific limit on the authority of NCUA. The initial clause generally allows NCUA to define proper membership in a federal credit union through rules and regulations. The "except" clause at issue here comes next, and specifically restricts NCUA's rulemaking discretion as follows:

> . . . *except that* Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

(emphasis added). These words have meaning. Indeed, for fifty years NCUA and its four predecessors adhered to the understanding that, *as a matter of law*, this clause meant that all members of an occupational credit union must share a single common bond. A change in views may not be fatal in evaluating the reasonableness of an agency's present policy in implementing an ambiguous statute in the light of current needs under "step two" of *Chevron* if a Court has already found that a statute allows that interpretation. See *Smiley v. Citibank (South Dakota)*, 116 S. Ct. 1730, 1734 (1996). But a fifty-year interpretation by the agency and its predecessors, dating back to the time of enactment, that the provision has a single legal meaning is strong evidence that the provision does not contain the ambiguity now claimed by the agency. *See Dimension Fin. Corp.*, 474 U.S. at 371 n.5 (declining to credit agency claim of ambiguity in the face of prior agency interpretations that were expressed not as policy but as required by law in light of "the language of the Act and the legislative history of its passage.").[19]

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[19] NCUA notes that a 1940 memorandum by the General Counsel of the Farm Credit Administration, a predecessor agency, stated that the common bond clause "does not by its own terms define itself with sufficient

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Now NCUA takes the position that the limiting clause was drafted in a way that makes it linguistically possible to read the words of the clause at issue, taken in isolation, to allow an occupational credit union to be chartered with an unlimited number of unrelated employer groups. NCUA does not contend that this latter view was actually conceived, much less desired, by Congress. Nor does NCUA seriously argue that Congress *intended* for the statute to contain ambiguity on this point (that is, the Agency does not contend that Congress's phrasing was artful ambiguity rather than inartful awkwardness), or that changed circumstances have created an ambiguity about how, for example, to apply the language in light of new technology. Rather, its argument in substance is that its favored reading of the statute is linguistically possible, and Congress's lack of drafting skill authorizes the Agency to choose whatever approach it likes.

That is not what *Chevron* and its progeny say. *Chevron* states that the interpretation of statutes is a search for Congress's intent. 467 U.S. at 842-43. ("If the intent of Congress is clear, that is the end of the matter . . . ."). Thus, this Court has repeatedly rejected agency interpretations, even though they were clever linguistic possibilities, when the Court has determined that Congress did not intend for the agency's approach to be within the range of permissible readings. *See, e.g., Dunn v. Commodity Futures Trading*

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[19] (...continued)

particularity to facilitate its application in all of the situations in which its application may be necessary." NCUA Br. 32-33 n.13. That observation is neither surprising nor relevant. The General Counsel did *not* say that the clause was ambiguous in any respect that would allow a credit union to combine multiple unrelated common bonds. On the contrary, the memorandum concluded that the only possible interpretation of the statute required that the members of a credit union all "have *a* common occupation or *a* common employer, or are otherwise associated through some common interest or enterprise. . . ." FCA Gen. Counsel, Legal Op. No 754-A, at 4 (Sept. 24, 1940) (emphasis added).

Comm'n, 117 S. Ct. 913, 916 (1997) (rejecting agency reading of statute that "seems quite unnatural" in favor of a "more normal reading"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (rejecting agency reading of statute based on alternative dictionary definition and noting that "[a]mbiguity is a creature not of definitional possibilities but of statutory context"); *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 226 (1994) (rejecting agency's reading of statute and rejecting contention that courts must defer to agency's choice of alternative dictionary definitions).

In this case, Congress spoke specifically to the point that membership in an occupational credit union was to be limited by the common bond, and did not give NCUA any discretion to avoid that limitation. In *Chevron* terms, Congress spoke "directly . . . to the precise question at issue." 467 U.S. at 842. The limiting words must mean either (1) as the courts of appeal say, that all members of the credit union must share a single common bond, or (2) as NCUA says, that members of the credit union may be associated with unrelated groups, so long as the groups have separate common bonds for their separate constituents. If the statute means (1), then *Chevron* is clear that no amount of agency policy justification can authorize NCUA's approach. If the statute means (2), then no agency policy analysis is required in order to support that approval. We submit that it is obvious that Congress intended one meaning or the other: the statutory language may be awkward when analyzed long enough and hard enough with *The King's English* in hand, NCUA Br. 31 n.11, but there is no basis to conclude that Congress intended to be ambiguous on this point in order to authorize NCUA to choose any preferred policy. Using the "traditional tools of statutory construction"—including common sense—the evidence is overwhelming that Congress intended to require that the members of each credit union share a single unifying occupational bond, not separate or even antagonistic ones.

B. The Language, Structure, and Legislative History of the FCUA Confirm That Congress Intended Section 109 to Limit Occupational Credit Unions to a Single Common Bond of Occupation.

1. *Text of Section 109.*

The starting point is the language of the statute: ". . . Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district." The natural reading of this provision, giving meaning to all of its words, is that the membership of an occupational federal credit union, however many subgroups it may contain, is *limited*; the limit is that the members of the credit union must have "a"—*i.e.*, one—unifying "common bond." NCUA's approval of ATTF's expansions violates the statute because ATTF's members admittedly do not share "a" common bond.

This is not merely the natural reading of Congress's words, it is the only reading that recognizes the "common bond" requirement in occupational credit unions. NCUA's argument is that the statute authorizes it to charter conglomerate credit unions consisting of an unlimited number of separate employer groups (despite the use in the statute of the word "limited") that are unrelated, or even antagonistic, to one another so long as each group has its own distinctive common bond. Thus, under NCUA's theory, as it reluctantly admitted to the court of appeals,[20] Section 109 permits the Agency to charter any credit union to admit into membership every employee of every company in the United States.[21] But

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[20] Tr. of Oral Hrg., Sept. 29, 1995 at 26-28.

[21] NCUA's regulations presently require that a credit union list the specific employers whose employees are to be included within the field of membership. That is, NCUA will not accept an application listing the

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this means that the statute's reference to "a common bond" for occupational credit unions is meaningless; the statutory limitation on NCUA's chartering "occupational" credit unions is only that the members have (or had) a job of some kind, somewhere.[22] That is obviously wrong.[23]

The point is that Congress enacted the "common bond" provision as a statutory *limit* on the Agency's policy options. By misreading the statute to permit the chartering of wholly generic "occupational" credit unions open to all workers, NCUA has read "common bond" out of the statute. As the court of appeals has observed, "the term 'common bond' would be surplusage if it applied only to the members of each constituent group and not across all groups of members in an

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[21] (...continued)
prospective membership as "[e]mployees of . . . firms in Seattle" because it does not specifically identify each common bond. Rather, an application should state the "names of [every] firm" (*e.g.*, ABC Inc., DEF Inc., GHI Inc., etc.). Federal Credit Union Field of Membership and Chartering Policy, 58 Fed. Reg. 40,470, 40,473 (1993). The difference appears to be only a matter of formality, subject to change. Moreover, as NCUA's approval of ATTF's expansions reflects, ABC, Inc., DEF, Inc., and the rest do not need to be in the same industry or the same geographical area.

[22] Actually, NCUA regulations are looser. NCUA's view is that membership in an occupational credit union is open to anyone with a job at a firm included in the membership list, and anyone else in such person's family. *See* 59 Fed. Reg. 29,066, 29,079 (1994) (family members of those within common bond eligible for credit union membership). In fact, under NCUA's "once a member, always a member" policy, a credit union may allow an individual to remain a member of the credit union after leaving the field of membership. *See id.*

[23] NCUA advised the court of appeals that, as a matter of its present regulatory policy, it would not approve such a national credit union open to all comers. But that *policy* may of course change, just as NCUA's position on other matters has changed: Before 1982 NCUA would not have allowed ATTF to expand across 50 states with more than 150 wholly unrelated employer groups.

FCU." Pet. App. 7a. That is not a plausible interpretation of Congress's text or intent. *See First City Bank*, 111 F.3d at 439 ("[W]e simply cannot conceive, and no one has suggested, any statutory rationale for requiring the type of 'common bond' NCUA has invoked."). If NCUA believes that the statute "may be imperfect," it "has no power to correct flaws that it perceives in the statute," but instead must ask Congress to amend the statute. *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

NCUA argues, NCUA Br. 34-35, that its interpretation is required because the statute uses "groups" in the plural, and in doing so it means to refer to multiple "groups" within one credit union. The court of appeals properly found this argument unpersuasive. NCUA has long taken the position—which respondents do not contest here—that different categories of employees of a single company, or the employees of a company and its subsidiaries may organize a single credit union *because they share a single common bond of occupation* even though they may be described as comprising several groups. NCUA, *Organizing a Federal Credit Union* 5-7 (Sept. 1972). The use of the plural "groups" means no more than that.[24]

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[24] The same point is reflected in a statute addressing the organization of Indians in Alaska that contains phrasing similar to the FCUA, Pub. L. No. 538, 49 Stat. 1250 (1936). It provides:

> [*G*]*roups* of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes but *having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district*, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans. . . .

(emphasis added). ATTF cites this provision to support its position that different groups may have different common bonds, ATTF Br. 39, but it

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The court of appeals below (as well as the Sixth Circuit) also concluded that NCUA's proposed "multiple bond" interpretation was not credible because it is contrary to the acknowledged meaning of the parallel clause concerning community credit unions. Pet. App. 8a-9a; *First City Bank*, 111 F.3d at 438. Section 109 allows only two types of federal credit unions—"common bond" credit unions based on occupation or association, and "community" credit unions based on geography. The statute defines these two types of credit unions in functionally parallel clauses, both using the plural word "groups." The reason NCUA's interpretation does not hold together is that it treats these parallel clauses, and the word "groups" in both of them, in contrary ways. The language is as follows:

> . . . Federal credit union membership shall be limited to [1] groups having a common bond of occupation or association, or to [2] groups within a well-defined neighborhood, community, or rural district.

NCUA concedes, as it must, that the community credit union clause does not allow adding one community after another into a single credit union. It admits that, even though the clause allows geographically defined credit unions to include plural "groups," all of the groups must share the same neighborhood, community, or rural district. 59 Fed. Reg. 29,066, 29,077 (1994) (community based credit union must be limited to "a single, geographically well-defined area where residents interact"); NCUA Br. 32. The correctness of this

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[24] (...continued)
actually undermines NCUA's argument. Under that provision, as under the FCUA, there may be more than one "group" within an incorporated organization, but there must be exactly one "common bond." Two groups of Alaskan Indians without a single shared common bond cannot organize to adopt a single constitution, and two occupational groups without a single shared common bond cannot join to form a single credit union.

concession is obvious: If it were permissible for a community credit union to be composed of an unlimited number of disparate geographic units across the country, then the statutory limitation to neighborhoods, communities, and rural districts, would be read out of the statute.

As the "groups" in a community credit union must share one community, the "groups" in an occupational credit union must share one common bond of occupation. It is an elementary canon of construction, and the only sensible approach if one is trying to understand what Congress actually intended in this statute, to read the two functionally parallel clauses in the same way. *See Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 225 (1992) (same language must be "accorded a consistent meaning within the [same] section" of a statute). NCUA struggles heroically to escape the logic of the statute, pointing out that the "common bond credit union" clause uses the word "having" and is "participial" while the "community credit union" clause uses the word "within" and is "prepositional." None of this, as the courts of appeals determined, makes a difference. Both the "having a common bond" clause and the "within a well-defined . . . community" clause, as NCUA ultimately concedes, refer to the key word (in NCUA's view) "groups," and they both limit which "groups" may be joined together within a single credit union. The question here, under *Chevron*, is what Congress intended; and it is not sensible to believe that Congress thought these two parallel clauses had the fundamentally different meanings for which NCUA now contends.

NCUA's final argument is that Section 109 *must be* ambiguous in the *Chevron* sense because the parties disagree about its meaning, because the district court below had to be reversed by the court of appeals, and because there was a dissent in the Sixth Circuit. NCUA Br. 33. The argument has no merit. A federal agency cannot, by boldly adopting a

jurisdiction-enlarging interpretation of a statute, automatically render the statute "ambiguous" in *Chevron* terms and thereby make the agency's position self-fulfilling. Moreover, this Court has repeatedly concluded that Congress's intent is unambiguous despite disagreements by lower courts about a particular statutory provision. *See, e.g., United States v. LaBonte*, 117 S. Ct. 1673 (1997) (holding that statutory provision is unambiguous despite split in circuits on meaning of language); *Dunn v. Commodity Futures Trading Comm'n*, 117 S. Ct. 913 (1997) (same); *John Hancock Mutual Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) (same).[25]

2. *Relationship of Section 109 To Other Provisions of the FCUA.*

The reading of Section 109 endorsed by the courts of appeals—that the members of a credit union must share a single common bond—is confirmed by another provision of the statute, the emergency merger provision adopted in 1982, Section 205(h), 12 U.S.C. §1785(h). This provision allows for the emergency merger of an insured, failing credit union into a healthy credit union without regard to the fact that each credit union is formed around a different common bond. Congress enacted Section 205(h) in response to a specific need identified by NCUA, which asked Congress for limited relief precisely because Section 109 prohibited it from merging occupational credit unions in emergency situations unless the credit unions happened to share the same common bond (an

[25] *Smiley v. Citibank (South Dakota)*, 116 S. Ct. 1730 (1996), which NCUA cites, does not support its argument. The issue in *Smiley* was the interpretation of the word "interest" in the National Bank Act. The Court found that notoriously protean term ambiguous in the context in which it was used because, as elaborated in diverse opinions from state supreme courts, that legal term had carried many different meanings in its long history in the common law and in various statutory settings.

obviously unlikely circumstance). NCUA's present argument, that Section 109 freely allows conglomerate credit unions of disparate common bonds within any occupational credit union, is entirely inconsistent with what it told Congress about the need for Section 205(h) and, more importantly, with the congressional action in response.

In the late 1970's and early 1980's, many occupational credit unions were in financial distress because of declining employment at sponsoring firms and economic hard times. It is common for regulators of financial institutions to seek to minimize dislocations in such situations by arranging for mergers among institutions, with the expectation that consolidated entities can better respond to economic stress. NCUA found itself unable to do this, however, with respect to occupational credit unions organized for employees of unrelated companies: the credit unions could not be combined because the members of the two existing credit unions did not share a single common bond as the statute would require of the resulting merged entity.

Congress attempted to address this problem in the Depository Institutions Amendments of 1977, but was then not willing, even in emergency situations, to abandon the principle that each credit union be defined by and limited to a single common bond. On the contrary, as the House Banking Committee's Report reaffirmed, "[t]he concept around which [credit unions] are organized, *people of close common interests* joining together for the economic benefit of *that group of persons*, is a concept [the] Committee has supported over the years." H.R. Rep. No 23, 95th Cong. 1st Sess. 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110 (emphasis added). However, Congress did permit a healthy credit union to come to the aid of a troubled one by purchasing its assets and liabilities, and enlarged credit union powers to provide for such transactions. *See* Pub. L. No. 22, § 303(e), 91 Stat. 49

(1977) (codified at 12 U.S.C. §1757(14)).[26] But credit unions were pointedly *not* allowed to combine their memberships. As the House Report explained: "Nothing in this provision shall be interpreted as a means for the merger of credit unions with dissimilar common bonds." H.R. Rep. No. 23, 12, 1977 U.S.C.C.A.N. at 116.

The 1977 medicine was not strong enough. NCUA's Chairman returned to Congress in 1981 to ask this time for authority to merge troubled credit unions into healthy ones—and specifically to allow limited relief from the common bond requirement for these transactions in order to allow the surviving credit union to add to its membership the workforce that defined the common bond of the disappearing institution. As Chairman Connell explained in the hearings:

> The [concern of NCUA], of course, is plant closings caused by obsolescence of much of our heavy industry. For example, there are some 160 credit unions affiliated with automobile plants. We are concerned because, as plant closings occur, our ability to merge credit unions who are undergoing that problem with other credit unions is made difficult by what is our McFadden Act. That is the common bond. *We can't combine credit unions with unlike fields of membership.*
>
> While we don't advocate retreating from the concept of a credit union common bond, we believe relaxation of that requirement for financially distressed institutions does warrant serious consideration. . . .

1981 Hearings at 109 (emphasis added).

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[26] Congress enacted similar but more limited legislation, presently codified at 12 U.S.C. § 1757(13), in 1968. See *supra* at 5.

The result of this request was legislation authorizing emergency mergers without regard to the common bond requirement, in individual situations, if NCUA made specified findings regarding the existence of an insolvency emergency, absence of other alternatives, and benefit to the public interest.[27] The House and Senate Reports both stated that the legislation was intended specifically to relieve NCUA from the strictures of the common bond requirement in such consolidations so that the resulting entity would not merely be acquiring the existing assets of the failing credit union, but could also serve the membership of the acquired credit union (in addition to the acquiring credit union's existing membership).[28] Except in these limited emergency circumstances, the legislation did not authorize avoiding the common bond limitation.

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[27] Section 205(h) provides:

> Notwithstanding any other provision of law, the Board may authorize a merger or consolidation of an insured credit union which is insolvent or is in danger of insolvency with any other insured credit union or may authorize an insured credit union to purchase any of the assets of, or assume any of the liabilities of, any other insured credit union which is insolvent or in danger of insolvency if the Board is satisfied that —
>
> (1) an emergency requiring expeditious action exists with respect to such other insured credit union;
>
> (2) other alternatives are not reasonably available; and
>
> (3) the public interest would be served by approval of such merger, consolidation, purchase, or assumption.

[28] *See* H.R. Rep. No. 272, 97th Cong., 1st Sess. 13-14 (1981) ("[T]he common bond concept is relaxed to permit not only the management of existing assets but also . . . the use of the acquiring credit union's resources to develop the field of membership to its full potential."); S. Rep. No. 536, 97th Cong., 2d Sess. 50-51 (1982) (new provision allows merger "of an insured credit union with another insured credit union without regard to the traditional common bond requirements of Section 109 of the Federal Credit Union Act . . . ."); *id.* at 8 (merger permitted by this section "without any restriction as to field of membership or geographic area").

NCUA's argument in this case, that the words of Section 109 have always authorized any occupational credit union to include an unlimited number of unrelated employer common bonds groups, is precisely the opposite of what it told Congress, and on which Congress acted, in adopting Sections 107(14) and 205(h). The argument that any occupational credit union can routinely be approved for multiple common bonds simply cannot be squared with Section 205(h)'s requirement that such multiple bond arrangements can only be approved in emergency circumstances, where no alternative exists, on the basis of specific findings by NCUA.

The enactment of Section 205(h) also answers the policy arguments NCUA advances in favor of its position. NCUA maintains that its policy is "a legitimate response to the volatile economic conditions of the late 1970s and early 1980s," NCUA Br. 40-41, that has "allowed credit unions to shield themselves from the economic consequences of widespread layoffs or plant closings of a particular employer.... Without the more expansive interpretation of the common bond provision many credit unions would have failed.... These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means." *Id.* at 40 (quoting *First City Bank*, 111 F.3d at 442 (Jones, J., dissenting)). NCUA's argument ignores the fact that Congress specifically addressed these very concerns in 1977 and 1982, and chose a different response than the one now endorsed by NCUA: Enacting Section 205(h) authorized NCUA to allow mergers of failing credit unions, resulting in multiple common bond groups in the surviving credit union, *but only in narrow circumstances required by emergency considerations on the basis of a specific NCUA determination that there was no alternative*. Congress did not authorize the casual formation of multiple common bond credit unions like

ATTF as a legitimate means to foster credit union growth in general.[29]

3. *Legislative History.*

Legislative history is one of the "traditional tools of statutory construction" appropriate for consideration in determining whether "Congress had an intention on the precise question at issue." *Chevron*, 467 U.S. at 843 n.9. In this case, the legislative history confirms that Congress did have such an intention. In every passage addressing the issue, the legislative history confirms that Congress intended that credit unions be limited to a single common bond of occupation.

Credit unions were still novel in the United States in the 1930's, and the 73d Congress that enacted the FCUA looked for understanding primarily from its own experience in enacting the legislation for District of Columbia credit unions in 1932 and the expertise of a few credit union experts, principally Roy F. Bergengren. Bergengren had long advocated that state-chartered credit unions be organized around a common bond[30] and, as NCUA has stated, Congress relied on Bergengren's descriptions of credit union practice

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[29] NCUA's "hard times" argument is on its face incongruous. Times were even harder in the 1930's when Congress enacted the FCUA. But, as we discuss below in connection with the legislative history, the Congress that enacted the FCUA indicated plainly that it had in mind credit unions with a single common bond of occupation, not multiple bond credit unions.

[30] In 1924, Bergengren developed a model credit union act that included the following common bond provision: "'Credit union organizations shall be limited to groups (of both large and small membership) having a common bond of occupation, or association or to groups within a well-defined neighborhood, community or rural district.'" GAO study at 217. Bergengren was co-founder of CUNA (then known as Credit Union National Extension Bureau). J.C. Moody & G.C. Fite, *Credit Union Movement: Origins and Development, 1850 to 1980* at 82 (2d Ed. 1984).

and his recommendations regarding legislation.[31] Indeed, Congress was quite clear that it intended to authorize only credit unions that adhered to the existing model of "typical credit unions" as Bergengren described them, S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934), without "any new form of practice or procedure," 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard).

Bergengren testified during the legislative hearings on the FCUA that an occupational credit union was organized around a single common bond, not multiple bonds. Indeed, this was the first difference between a bank (which would serve all comers) and a credit union (which would serve only those within its common bond, and could do so on a more intimate basis). The credit union might have a large number of members, but they would all share one common bond:

> Mr. Bergengren: If I may I would like to explain to you very briefly just exactly what a credit union is.
>
> Senator Bankhead: We want that information.
>
> Mr. Bergengren: A credit union is a bank, but it is a peculiar sort of bank. Peculiar in the first place because every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group. . . .

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[31] *See, e.g.*, NCUA, *Studies in Federal Credit Union Chartering Policy* §II, at 13 (1979) (". . . Bergengren described to the legislators his understanding of credit union organization. It is safe to assume that these views were accepted by the Congress."). When Bergengren testified before the Senate Banking Committee, Senator Sheppard introduced Bergengren as the man "who has done more to promote the [credit union] movement than any other man in the United States," *Credit Unions: Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st 13 (1933).

> Therefore a credit union first, as I have said, is a bank which is organized within a specific group of people. That group may be quite large. The Telephone Workers Credit Union in Boston has 16,000 members. It is, however, confined to the employees of the New England Telephone & Telegraph Co.
>
> *****
>
> Senator Bankhead: Let us say, for instance, you go to Baltimore and you go into a certain kind of a store. Do you include just one store in that group?
>
> Mr. Bergengren: Yes. The organization of a group depends to a certain extent on geographical distribution. For instance, members of the union have to be close enough geographically so as to operate effectively.
>
> Senator Bankhead: Take the clerks in the stores. Who are eligible in the group if you organize one in Baltimore?
>
> Mr. Bergengren: Take, for instance, the Tennessee Coal, Iron & Railroad Co. in Birmingham, Ala. There we have the T.C.I. Credit Union.
>
> Senator Bankhead: And it is limited to a single employer?
>
> Mr. Bergengren: Yes.
>
> Senator Bankhead: The group, then, must be composed of people employed by the same company?
>
> Mr. Bergengren: Yes.

1933 Hearing at 15, 24.

This understanding was reiterated in the statement of

Senator Sheppard, the sponsor of the bill that became the Act:

> A credit union is a cooperative bank organized within and in each case limited to a specific group of people. . . . No one outside the specific group can have anything to do with the specific credit union.

77 Cong. Rec. 3206 (1933). A year later, as Congress continued to review the issue, the same point was repeated by Senator Sheppard: "Credit unions are organizations of working people which enable members of *a given group* to save money . . . which is loaned to *members of the individual group* . . . " 78 Cong. Rec. 7259 (1934) (emphasis added). The same limitations were emphasized in the Senate Report, describing the institutions to be chartered as consisting of "a cooperative society . . . limited in each case to the members of a specific group with a common bond of occupation or association. . . ." S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934). Similar statements were made on the House side. *See e.g.*, H.R. Rep. No. 2021, 73d Cong., 2d Sess. 2 (1934) (credit unions provide "self-help among groups of wage workers or farmers having a community of interest").

This legislative history shows that Congress did have a specific understanding that, as the statutory language states, the occupational credit unions it was authorizing would each be limited under Section 109 to members joined by a specific common bond, not a conglomerate of unlimited and unrelated company groups. In fact, NCUA's own thorough survey of the legislative history, published in 1979, confirms that Congress intended to follow this established model described by Bergengren. NCUA, *Studies in Federal Credit Union Chartering Policy* § II, at 12 (1979). NCUA's survey concluded:

> It is apparent that Congress never lost sight of this critical common bond factor throughout its long history in the Act [and subsequently as the Act has been amended]. Congress appears not to have intended that the central characteristic of credit union organization, i.e., *the limited membership within a specified group of persons*, be changed.

Id. at 14 (emphasis added).

There is no contrary legislative history. Nowhere in the legislative history of the 1934 Act is there any reference to any credit union composed of unrelated groups of members, or even the theoretical possibility that such a credit union might be formed.[32] Nor is there any support in the legislative history for NCUA's policy argument that multiple bond credit unions are necessary in order to bring credit union services to employer groups that are too small to support a viable credit union by themselves, a "purpose" NCUA appears to have made up in 1983 to justify its new policy.[33] NCUA Br. 39-40; J.A. 44.[34] Indeed, the historical justification for the common

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[32] ATTF—but not the Government—points to a statement in the House Report stating that "[m]embership in Federal credit unions is limited to groups having common bonds of occupation or association," H.R. Rep. No. 2021, 73d Cong., 2d Sess. 3 (1934), and asserts that this passage indicates that a single credit union may include more than one common bond. Obviously it does not; the passage only refers to multiple credit unions (plural) as having *between them* multiple common bond groups.

[33] ATTF—but again not NCUA—earnestly argues that a passage in the House debates on the FCUA indicates that Congress "may" have intended multiple common bond credit union to exist because Representative Luce indicated that clerks in a business with only one or two employees could join a credit union. ATTF Br. 42. But the ATTF is trying to put this passage into a context it never had. Of course clerks in a small business may be members of a credit union with a *single* common bond among all members, such as a credit union associated with a clerk's union or a civic or religious association; alternatively they might join a "community" credit union. Representative Luce said no more than this.

[34] The substance of NCUA's argument appears to be that the purpose of

(continued...)

bond as a means of promoting financial stability in credit union is just the opposite. If the purpose of the "common bond" is to enable the credit union to "loan on character" because it would "'realistically operate with unity of purpose' and . . . managers would 'possess a common . . . occupation with the membership they serve,'" NCUA Br. 19 (citations omitted), that purpose would be undermined, not advanced, by admitting into the credit union countless unrelated groups who are unknown to each other and were selected to join precisely because they were unable to handle their own financial affairs. NCUA now argues that the common bond's purpose to "ensure that all members of a credit union 'are known by the officers and by each other'" is "anachronistic." Id. at 40, quoting in part Pet. App. 11a. But NCUA's policy views do not entitle it to overrule Congress's intent.

Faced with legislative history from the enactment of the FCUA that completely undermines its position, NCUA makes an extended argument that because Congress has not enacted a statute overruling the 1982 administrative approach at issue here, it has ratified NCUA's position as a *policy* matter. NCUA Br. 43-47. That argument is wrong. This Court has many times warned that legislation may fail to be enacted for many and uncertain reasons, so that "congressional silence lacks persuasive significance."[35] Even NCUA does not pretend to argue that recent inaction indicates in any way that the statute *as enacted* was intended by Congress to allow that

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[34] (...continued)
the common bond limitation was to strengthen credit unions and thereby lead to their expansion, and that ignoring the common bond limitation fulfills this purpose even more by allowing further expansion.

[35] *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (internal quotations omitted). *See also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.").

policy. And on that question, which is the question before this Court, even the *post*-enactment history "directly addressing the precise question at issue" is uniformly against NCUA's interpretation. As already discussed above, for example, Congress explicitly stated in 1981 and 1982 that Section 109's common bond limitation made it necessary to enact a special provision, Section 205(h), in order to authorize NCUA to approve emergency mergers (in exceptional circumstances) between two credit unions that were sponsored by different employers. *See supra* at 41-42. Other explicit post-1934 statements by Congress are abundant and uniform in confirming its understanding of the Act to require occupational credit unions to be limited to a single group. *E.g.*, H.R. Rep. No. 1791, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S.C.C.A.N. 2172 ("Membership in a particular Federal credit union is limited to a group having a common bond of occupation, or association, or a group within a well-defined neighborhood, community, or rural district.")[36]; S. Rep. No. 814, 86th Cong., 1st Sess. at 1 (1959) *reprinted in* 1959 U.S.C.C.A.N. 2784 ("Federal credit unions are cooperative associations.... Membership is limited to a group of persons having a common bond of association, occupation, or residence.")[37]; S. Rep. No. 1265, 90th Cong., at 2 (1968) *reprinted in* 1968 U.S.C.C.A.N. at 2471 ("No

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[36] This statement related to a law transferring administration of the FCUA from the Federal Deposit Insurance Corporation to the Federal Security Agency. Pub. L. No. 813, 62 Stat. 1091 (1948). The statement was included in a paragraph providing a general description of credit unions.

[37] This statement related to the Federal Credit Union Act of 1959, in which Congress made numerous changes to the FCUA. Congress revised Section 109 in order (1) to recognize that the Act would now be implemented by the Director of the Bureau of Federal Credit Unions, and (2) to provide for issuance of shares of a credit union in joint tenancy. Pub. L. No. 354, § 10, 73 Stat. 628 (1959). Congress left unchanged the language of the common bond requirement.

individual may belong to a credit union or borrow from a credit union unless he is within the common bond concept of that credit union. This concept is extremely meritorious and should be maintained.").[38]

For all of these reasons, the legislative history of Section 109 confirms what the statutory language itself says. The membership of an occupationally defined federal credit union must be limited based on a single common bond shared by all members. The law does not allow conglomerate "occupational" credit unions composed of an unlimited number of unrelated or even antagonistic employer groups, such as ATTF.

[38] This statement related to an amendment to the Act to allow credit unions to purchase notes held by liquidating credit unions. *See* 12 U.S.C. 1757(13). The Senate Report went on to say that, "[o]nce [a] note had been fully repaid to the purchasing credit union . . . that credit union could not extend additional financing to the borrower unless he was within the common bond of the purchasing credit union." S. Rep. No. 1265 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 2471.

CONCLUSION

This Court should affirm the decisions of the court of appeals.

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Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

and

AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

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OCTOBER TERM, 1997

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Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS AT&T FAMILY FEDERAL CREDIT UNION AND CREDIT UNION NATIONAL ASSOCIATION, INC.

As we explained in our opening brief, the Court of Appeals erred in allowing the Banks—whose competitive interests are antithetical to those that Congress intended to protect through the common bond provision—to thwart Congress' purposes by substituting their preferred interpretation of ambiguous statutory language for that of the agency entrusted by Congress to administer the statute. It is telling that the Banks do not even *attempt* to defend the reasoning of the Court of Appeals, either on standing or on the merits. Whereas the Court of Appeals found standing on the theory that the Banks—although their

interests are not among those that Congress intended to protect—are nevertheless "suitable challengers" to vindicate Congress' intended purposes, the Banks largely ignore Congress' intent in enacting the common bond provision and contend that they have standing merely because NCUA's ruling has caused them competitive injury. And whereas the Court of Appeals purported to find that the plain language of the statute unambiguously precludes NCUA's multiple group policy, the Banks pay little attention to the statutory language directly at issue and instead urge the Court to override NCUA's policy based largely on snippets of legislative history, most of which do not even relate to the FCUA itself.

The Bank's defense of the Court of Appeals' judgment is as flawed as that court's own rationale. Absent any indication that Congress intended the common bond provision to protect competitive interests of the sort asserted by the Banks, they lack standing under the APA. But even if the Court were to hold otherwise, under *Chevron* the Court should defer to the agency's interpretation of the ambiguous statutory language, rather than to the purported import of legislative history that is itself unclear.

I. THE BANKS LACK STANDING

1. The Banks have eschewed the "suitable challenger" doctrine that formed the basis for the Court of Appeals' ruling on standing; indeed, the words "suitable challenger" do not even appear in their brief. *Contrast* Pet. App. 26a, 29a, 30a, 31a, 33a n.3, 34a. Instead, the Banks' argument consists principally of a simplistic syllogism: (a) the Banks are competitors of credit unions; (b) NCUA's interpretation adversely affects the Banks' competitive interests; and therefore (c) the Banks have standing under the APA. Or as the Banks themselves put it, "the competitive injury suffered by banks means that they are 'aggrieved by agency action within the meaning of a relevant statute' under Section 10 of the Administrative Procedure Act, and therefore have standing to challenge

the NCUA action." Resp. Br. at 10. That is decidedly not the law. As this Court has stressed, such an argument is "mistaken, for it conflates the zone-of-interests test with injury in fact. * * * [I]njury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute." *Air Courier Conference of America* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 524 (1991).

Contrary to the Banks' contentions, there is no exception to the zone of interests test for cases involving competitive injury. In every case, the controlling question is whether the injury asserted by the plaintiff "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 883 (1990). *See Bennett* v. *Spear*, 117 S. Ct. 1154, 1161, 1167 (1997); *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970). Thus, the question here is not whether the Banks have suffered competitive injury as a result of NCUA's interpretation of the common bond provision; the question is whether their competitive interests are among the interests that provision was intended to protect or regulate.

The Banks' theory—which would equate competitive injury with prudential standing—is even broader than the suitable challenger doctrine they so studiously avoid, for under the Banks' theory competitors would be accorded standing without any analysis of whether their competitive interests bear a relation to the purposes of the statute. For example, if the Federal Aviation Administration, acting pursuant to an airline safety statute, were to issue a regulation that had the effect of increasing the number of passengers allowed on flights, under the Banks' proposed rule a railroad trade association would be able to challenge the regulation on the theory that more airline passengers means fewer railroad passengers—notwithstanding that the safety statute was plainly intended to benefit airline pas-

sengers, not airline competitors. Likewise, the Banks would have standing to challenge NCUA's interpretation of restrictions on the loans that credit unions may make to members, *see* 12 U.S.C. § 1757(5), on the theory that any such restriction inures to the competitive advantage of banks—notwithstanding that these restrictions (like the common bond provision) were plainly intended to protect credit unions and their members, not banks or other competitors.[1] The zone of interests test would be rendered meaningless if such a theory were accepted.

2. Contrary to the Banks' contentions, none of this Court's precedents has established a different standing analysis for plaintiffs who allege competitive injury. Rather, as explained in our opening brief, *see* ATTF Br. at 26-29, in each of the Court's cases upholding competitor standing, Congress has evinced a specific intent to regulate competition in some way. Thus, in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("ICI"), the Court described its prior decision in *Data Processing* as having held that "Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." *Id.* at 620. In their brief, the Banks distort this quotation by rephrasing the question as whether Congress had legislated "against banks *engaging in the particular activities constituting* 'the competition that the petitioners sought to challenge, and from which flowed their injury.'" Resp. Br. at 19 (quoting *ICI*, 401 U.S. at 620) (emphasis supplied). The Banks' distortion is important. *Whenever* a plaintiff contends that it has suffered competitive injury as a result of an allegedly improper administrative determination, the plaintiff will necessarily allege that Congress has legislated against the particular *activities* constituting the competition from which its injury flows. But zone of interests standing will exist only when Congress has actually "legislated against the competition" *itself*. *ICI*, 401 U.S. at 620, 621. Otherwise, the mere existence of Article III injury-in-fact would suffice to accord prudential standing under the APA.

[1] For example, 12 U.S.C. § 1757(5)(x) prohibits a credit union from issuing to any member loans exceeding 10 percent of the credit union's capital and surplus. A regulation allegedly easing this limit would arguably injure banks competitively, since a member barred from further credit union loans might go to a bank. Banks would nonetheless lack prudential standing to challenge the regulation, because the statutory provision was intended not to protect banks from competition but to promote credit union financial stability and the interests of credit union members—just like the common bond provision. *See* ATTF Br. at 20-25.

The Court's other standing cases confirm that the mere allegation of competitive injury is not sufficient to confer standing under the APA. For example, in *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987), the Court did not rely simply on the fact that the plaintiffs were competitors of the regulated entities, but rather made clear that the statute at issue was intended "to keep national banks from gaining a monopoly control over credit and money through unlimited branching." *Id.* at 403. Likewise, in *Bennett*, *supra*, the Court did not rely on the fact that the plaintiff ranchers "claim[ed] a competing interest in the water" at issue, but instead carefully analyzed the statutory provision in question and concluded that the plaintiffs had standing because the specific interest they asserted—the prevention of inefficient agency decisions—was plainly among those Congress intended to protect when it required agency decisions to be made on the basis of the best available scientific and commercial data. *Id.* at 1160, 1168.

To be accorded standing as a competitor, it is not necessary that competition itself be the sole focus of the legislation. Rather, as we have explained (*see* ATTF Br. at 27), the Court has found competitor standing where Congress believed that a restriction on competition was the appropriate means to achieve some greater end. *See Clarke*, 479 U.S. at 398 (describing holding in *ICI*). And contrary to the Banks' mischaracterization, neither we nor NCUA contend that "the plaintiff's specific type of

institution must be particularly mentioned in the legislative history." Resp. Br. at 23. But where, as here, Congress has not legislated against competition at all and had no intent to benefit the plaintiff's particular interests, the plaintiff is not within the zone of interests protected by the statute and lacks standing under the APA.

3. It is not surprising that the Banks have postulated a new theory of competitor standing that does not depend on Congress' intent. For as we have explained (*see* ATTF Br. at 20-25), the common bond provision was clearly intended to protect credit unions and their members, not banks or other competitors. As we further explained—and as the Banks do not dispute—Congress saw its proposed credit unions as largely serving a market that banks had disdained, and thus one that did not even implicate their competitive interests. *Id.* at 5-6, 22. Finally, the Banks ignore the fact that every court to have addressed the issue—including the court below—has concluded that the purposes of the common bond provision have nothing to do with (and in fact are antithetical to) the competitive interests of banks. *Id.* at 23-24.

Rather than relying on the actual intended purpose of the common bond provision, the Banks spin out a grand unified theory under which Congress purportedly segmented the financial services markets to protect the various segments from competition, providing benefits to each group conditioned on various restrictions enforceable by the competing entities. *See* Resp. Br. at 11-12, 16, 24-25. The Banks, however, offer no support for their contention that the common bond provision was part of some broader design for protecting banks from competition, and there is no such support.[2]

[2] As part of their theory, the Banks note that "credit unions do not pay federal taxes and are not covered by the Community Reinvestment Act or certain other laws, but the membership of a credit union is limited by the common bond requirement." Resp. Br. at 11-12. This theory suffers from a fundamental anachronism: when the common bond provision was enacted, federal credit unions were *not* exempt from federal taxes, and would not be for several years, *see* Pub. L. No. 75-416, § 4, 51 Stat. 4 (1937), while the Community Reinvestment Act, Pub. L. No. 95-128, 91 Stat. 1147 (1977), was not even a gleam in a legislator's eye. The common bond provision was thus hardly a restriction imposed in exchange for the benefit of exemption from these provisions.

The common bond provision has nothing to do with competition. Unlike the banking statutes relied on by the Banks, the common bond provision does not prevent credit unions from offering services provided only by banks. Instead, the provision is a useful organizing principle that also helps ensure the strength and viability of credit unions by requiring that each member be part of a group with others who are similarly situated. Congress thought this was one of the features that had allowed state credit unions to emerge from the Great Depression unscathed, and wanted to ensure that federal credit unions enjoyed similar strength and stability. *See* ATTF Br. at 5. The fact that competitors of banks have been accorded standing to enforce various anti-competition limitations contained in banking statutes says nothing at all about whether banks have standing to enforce a quite different provision in the FCUA that has nothing to do with competition.

4. As a fallback argument, the Banks contend—contrary to the holding of the Court of Appeals—that the FCUA and its legislative history demonstrate that the common bond provision was in fact intended to protect banks from competition with credit unions. *See* Resp. Br. at 24-27. Yet the Banks can point to nothing in the FCUA itself or its legislative history that supports this assertion. Instead, the Banks rely principally on the legislative history of an earlier statute, the District of Columbia Credit Unions Act. That legislative history, moreover, consists largely of hearing testimony from a bankers' representative, rather than statements by the legislators themselves. Accordingly, the material relied on by the Banks can shed little, if any, light on what was intended by the Congress

that enacted the D.C. Act, let alone the later Congress that enacted the FCUA. *See, e.g., Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986) (according no significance to statements where "none of [the] statements was made by a Member of Congress, nor were they included in the official Senate and House Reports.").

Even if the legislative history of the D.C. Act were relevant in construing the FCUA, the material cited by the Banks would not support their contention at all. It shows only that banking interests had expressed views on certain provisions of the D.C. Act, *none of which had anything to do with the common bond provision.* During hearings on the D.C. law, a bankers' representative objected only to three proposed provisions: one allowing D.C. credit unions to accept deposits from members (rather than requiring the members to purchase shares), another requiring the credit unions to deposit their excess funds only in national banks (rather than state banks as well), and another granting tax exemptions to the credit unions. *See Incorporation of Credit Unions: Hearings Before the Senate Comm. on the District of Columbia on S. 1153*, 72d Cong., 1st Sess. 25-26, 28, 32, 36 (1932) [hereinafter, "*1932 Hearings*"]. The first two items were addressed through amendments, *see* 75 Cong. Rec. 7889 (1932), but the tax exemption was retained in the final version of the D.C. law. *See* Pub. L. No. 72-190, 48 Stat. 326, 331 (1932).

The concerns of banking interests, however, had no effect on Congress' consideration of the D.C. Act's common bond provision or any other provision relating to credit union membership. As the Banks concede (*see* Resp. Br. at 25), the common bond provision was included in the proposed legislation *from the outset*, and was even included in an earlier D.C. credit union bill introduced in 1931. *See 1932 Hearings* at 3; *Credit Unions and Small Loans: Hearings Before the Senate Comm. on the District of Columbia on S. 4775*, 71st Cong., 3d Sess. 1-3 (1931). Moreover, as this Court recently emphasized, the zone of interests question is to be determined "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 117 S. Ct. at 1167. Thus, even if the legislative history of the D.C. Act were relevant, hearing testimony relating to *other* provisions of that law is of no probative value in the standing inquiry now before the Court.[8]

The Banks also contend that the problem of competitive injury to banks was raised and addressed during consideration of the FCUA itself. Resp. Br. at 26. The Banks' two citations, however, do not even remotely support that assertion. During hearings on the FCUA, a senator inquired whether commercial banks opposed the establishment of credit unions, and was told that they did not. *See Credit Unions: Hearings Before a Subcomm. of the Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933). And in a subsequent exchange on the floor of the House, a representative was asked whether the proposed legislation would take the place of federal crop protection loans—a concern apparently prompted by the fact that the FCUA initially gave the Farm Credit Administration responsibility for overseeing federal credit unions—and he responded that it would not. *See* 78 Cong. Rec. 12,224 (1934) (Rep. Luce).

These statements are no evidence that Congress intended anything in the FCUA—much less the common bond provision—as an anti-competition device. In fact,

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[8] The prudential standing limitation would not serve its important separation of powers function, *see Bennett*, 117 S. Ct. at 1161, if a plaintiff could establish its right to sue to enforce *any* provision of the statute merely by bringing itself within the broad purposes of *other* provisions or the statute as a *whole*. The pertinent question is whether the Banks have carried their burden of establishing that they are within the zone of interests protected by the common bond provision. As noted, all the available evidence confirms that that particular provision was enacted to safeguard the interests of credit union members—not banks—by promoting credit union stability.

the relevant legislative history demonstrates precisely the opposite: to the extent Congress thought about banks at all, Congress believed that credit unions were necessary because they would largely serve a market that banks had shunned—not one implicating their competitive interests. *See* ATTF Br. at 5-6, 22.[4]

5. Both the decision below and the Banks' theory depart sharply from this Court's precedents to find standing. This Court has repeatedly emphasized that the zone of interests inquiry turns on congressional intent. *See* ATTF Br. at 18 (quoting cases). The court below expressly acknowledged that Congress did *not* intend to benefit the competitive interests of banks through the common bond provision, *see* Pet. App. 30a, yet nonetheless conferred standing on the Banks as "suitable challengers." While the Banks eschew that approach, they similarly abandon any focus on congressional intent, asking instead simply whether banks are competitors of credit unions—without regard to whether *Congress* viewed them as such or sought to protect their interests as such through the common bond provision. This transforms the inquiry from one of congressional intent into one of regulatory effects. Both the approach of the court below and of the Banks shift the authority for determining who may challenge regulatory actions from Congress to the courts, in contravention of the basis for prudential standing doctrine " 'in concern about the proper —and properly limited—role of the courts in a democratic society.' " *Bennett*, 117 S. Ct. at 1161 (quoting *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975)).

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[4] Moreover, as we have explained and as the Banks do not dispute, credit unions are not now significant competitors of commercial banks, fifteen years after the promulgation of the multiple group policy. *See* ATTF Br. at 28 n.9. In fact, as of the end of 1996, the assets of each of the two largest commercial banks—Chase Manhattan and Citibank—were greater than the assets of *all* federal credit unions put together. *Compare* Sheshunoff Bank Quarterly at I-88 (1997) *with* NCUA 1996 Annual Report 62.

When the zone of interests test is loosened from its proper mooring in the intent of Congress, there is a greater likelihood that parties will seek through litigation to further goals at odds with those intended by Congress in the governing statute. Here, for example, the Banks have sought to have the common bond provision interpreted in accord with their competitive interests in weakening credit unions, while Congress intended for that provision to have precisely the opposite effect. If the zone of interests test is to have any meaning at all, it must deny standing in such a situation.

II. NCUA'S MULTIPLE GROUP POLICY IS A REASONABLE INTERPRETATION OF AMBIGUOUS STATUTORY LANGUAGE

1. Given that the Banks' argument on the merits rests entirely on their contention that Congress has "directly spoken" to the precise issue presented by this case (*see* Resp. Br. at 29), their brief is notable for its cursory analysis of the language of the statute. Indeed, the only word that the Banks expressly rely on from the phrase directly at issue is the article "a" in "a common bond." *See id.* at 33. The Banks, however, acknowledge that the use of the plural "groups" means that each federal credit union may contain more than one group. *Id.* at 35. Thus, as we have explained and as the Court of Appeals agreed, Congress' use of the article "a" could just as easily mean one common bond for each of the separate groups as a single bond shared by all of the groups. *See* ATTF Br. at 35; Pet. App. 6a.

The Banks do not even attempt to counter that position. Instead, they contend, like the Court of Appeals, that the term "common bond" would be " 'surplusage' " if it applied to the members of each constituent group. Resp. Br. at 34-35 (quoting Pet. App. 7a). But the Banks do not defend the reasoning that led the Court of Appeals to this conclusion—that the term "group" necessarily implies the notion of a common bond—and do not even attempt to rebut any of our criticisms of that holding. *See* ATTF Br.

at 35-39. Nor do they offer a different interpretation of the statutory language that would lead to that conclusion. Accordingly, the Banks simply have no answer to our point that the language of the common bond provision permits multiple groups, each with its own common bond.

The Banks' only other argument that refers to the language of Section 109 is their contention that each group in an occupational credit union must share a single common bond, because "community"-based credit unions are limited to groups "within a well-defined neighborhood, community, or rural district," and NCUA interprets that language to mean that all groups must be within a single community. According to the Banks, the two "parallel clauses" should be read in the same way. *See* Resp. Br. at 36-37. But as we have explained (*see* ATTF Br. at 39-40), the clauses are *not* "parallel."[8] While the term "groups *within* a well-defined neighborhood" is perhaps most naturally read as requiring that all groups be within the same community, the term "groups *having* a common bond of occupation" does not similarly require that each group share the same bond. Congress knows how to make these clauses parallel when it wants to, *see* 25 U.S.C. § 473a (quoted in ATTF Br. at 39), but it did not do so here.

Without refuting this textual analysis, the Banks contend that "it is not sensible" to believe that Congress intended for the different language in the two clauses to be interpreted in this manner. Resp. Br. at 37. But the question under the first step of *Chevron*—the only question the Banks have preserved, *see* Pet. App. 6a—is whether Congress' intent is ambiguous, not whether the agency's interpretation is reasonable. The Banks have chosen not to argue that NCUA's interpretation is unreasonable under the second step of *Chevron*. Nor could

[8] A parallel construction would instead be something like "groups having a common bond of occupation or association, or groups having a common bond of neighborhood, community, or rural district residence." In such a case the second clause would simply replicate the ambiguity of the first.

they, for that interpretation is plainly in accord with Congress' policy objectives. *See* ATTF Br. at 46-49.

2. Having no real argument that the statutory language is unambiguous, the Banks posit a novel interpretation of the *Chevron* doctrine: that even where a statute is ambiguous, courts should defer to an agency's interpretation only if Congress specifically "intended to be ambiguous." Resp. Br. at 32. In other words, according to the Banks, *Chevron* applies only to instances of "artful ambiguity rather than inartful awkwardness." *Id.* at 31.

That is not the law. As explained in *Chevron* itself, the principle of deference to agency interpretations applies both to policy choices that Congress "inadvertently did not resolve," as well as to those that Congress "intentionally left to be resolved by the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984). Thus, in neither *Chevron* nor its progeny has the Court, after concluding that statutory language was ambiguous, engaged in a separate inquiry to determine whether Congress specifically *intended* to be ambiguous before according deference to the agency's interpretation. Rather, the Court has made clear that "[i]f the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988). *Accord, National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) (Deference is owed whenever the "text is ambiguous and so open to interpretation in some respects.").

3. The Banks also contend that NCUA's interpretation is "obviously wrong" because it would purportedly allow the agency "to charter any credit union to admit into membership every employee of every company in the United States." Resp. Br. at 34, 33. This straw-man argument, however, confuses the second step of the *Chevron* analysis—which the Banks have not raised in this case—with the first. As we have explained, *see* ATTF

Br. at 45, NCUA has not (and under current regulations could not) charter such a universal credit union. Nor do the Banks contend otherwise. Instead, they posit that the current policy must be invalid because NCUA might change it to something the Banks would find unreasonable. *See* Resp. Br. at 34 n.23.

But the first step of the *Chevron* analysis asks only whether the agency has interpreted ambiguous language. The issue here is whether Section 109 plausibly may be read to permit federal credit unions to consist of more than one group, each with its own common bond. If NCUA may interpret the provision in this way, the Banks' claim must fail. Whether Section 109 permits NCUA to charter "generic" credit unions or even credit unions that include a large number of groups is a *Chevron* step two issue that the Banks have expressly declined to raise.[6]

Moreover, even if the Banks' policy arguments were relevant to the ambiguity inquiry, those arguments would not help their case. The Banks contend that the common bond provision was intended as a "*limit* on the Agency's policy options," Resp. Br. at 34 (emphasis in original), but they misunderstand the nature of the "limits" the common bond provision was intended to place on credit unions. The provision was not intended to limit the growth of credit unions or to restrict competition. Rather, the limiting principle of the common bond provision—from which all of its perceived benefits can be derived—is that each member must be part of a group with others who are similarly situated, which facilitates lower-cost information on creditworthiness, ease of repayment through

[6] NCUA's discretion is limited by the purposes of the common bond provision to foster the growth and stability of credit unions. For example, if the agency were to approve a single "occupational" group consisting of all persons who are employed, that interpretation—though it might comport with the ambiguous statutory language—could nevertheless be challenged as unreasonable under the second step of *Chevron* as not bearing a rational relation to the purposes underlying the common bond provision.

payroll deductions and the like, and greater certainty of repayment through the moral and social pressure of knowing default would affect fellow co-workers. *See* ATTF Br. at 43-45. That is, in any event, how the agency interprets the statute, and that interpretation is plainly entitled to deference, particularly given that the Banks themselves profess that they "do not know Congress's complete or precise purposes" for the common bond provision. Resp. Br. at 19.

4. The Banks attempt to find in legislative history the clarity that is lacking in the statutory language. The Banks, however, purport to find that clarity not in the legislative history of the common bond provision, but rather in brief excerpts from the FCUA's history not directly addressed to the precise question now at issue. And what is more, the Banks rely principally on "subsequent" legislative history (including hearing testimony) that occurred nearly *fifty years* after the FCUA was enacted. Such dubious legislative history cannot override NCUA's interpretation of ambiguous statutory language pursuant to its expressly delegated powers.

As we have already explained (*see* ATTF Br. at 41), the proper role of legislative history in this case is extremely limited. Under *Chevron*, the Court may indeed use "traditional tools of statutory construction," but only to determine whether the intent of Congress is "clear" as to the "precise question at issue." 467 U.S. at 842-843 & n.9. Where, as here, the statutory language is ambiguous, the Court must defer to the agency's reasonable interpretation unless the legislative history is so clear on the precise question as to compel a contrary resolution.[7]

[7] *See Regents of Univ. of California* v. *Public Empl. Rel. Bd.*, 485 U.S. 589, 603 (1988) ("Where the statute itself is not determinative and is open to more than one construction, the legislative history must be quite clear if it is to foreclose the agency's construction.") (White, J., concurring); *Chevron*, 467 U.S. at 858 (rejecting reliance on legislative history that "was not * * * addressed to the precise issue raised by these cases").

Every court to have examined the legislative history of the FCUA has concluded that it does not definitively answer the "precise issue" in this case: whether the common bond provision permits credit unions consisting of multiple groups, each with its own common bond. *See* Pet. App. 11a-12a, 21a; *First City Bank* v. *NCUA*, 111 F.3d 433, 439 (6th Cir.), *pets. for cert. filed*, Nos. 96-2018 (June 23, 1997) & 97-100 (July 15, 1997). The Banks' citations do not prove otherwise. As for the legislative history of the FCUA itself, the Banks cite a reference from a committee report and several stray statements from individual legislators, all of which generally described a credit union as being composed of a single group of people. *See* Resp. Br. at 45-46. Likewise, the Banks refer to a witness' hearing testimony to the same general effect. *See id.* at 44-45.

As the district court found, these statements did not purport to be elucidating the specific language of the common bond provision at all and "may well be little more than a description of the field of state credit unions as they existed in 1934." Pet. App. 20a. The Banks themselves characterize Mr. Bergengren's testimony as simply "descriptions of credit union practice." Resp. Br. at 43. The fact that some members of the 72d Congress may have understood the credit unions of the day to consist of a single group says nothing about whether that Congress, in Section 109 of the FCUA, unambiguously required that all federal credit unions be similarly constituted.

Given this fact, the Court should not now impose a static structure on all credit unions based on the general characteristics of credit unions as they may have existed in 1934. Among the purposes of the *Chevron* doctrine is to allow the administering agency "ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust* v. *Sullivan*, 500 U.S. 173, 187 (1991) (quotations omitted). Accordingly, given the ambiguity of the common bond provision, NCUA has the latitude to rethink its common bond policy in light of

changed economic circumstances that otherwise would threaten credit union stability and viability. *See* ATTF Br. at 9-10.

Finally, the Banks place great weight on the history of amendments to the FCUA enacted in 1977 and 1982. *See* Resp. Br. at 38-43.[8] It is well-settled, however, that subsequent legislative history is useless in interpreting the intent of a prior Congress.[9] This rule applies with full force here. The 1977 legislation provides that a credit union may purchase assets from another credit union, *see* 12 U.S.C. § 1757(14), and the 1982 legislation provides that NCUA may authorize emergency mergers of failing credit unions in certain circumstances "[n]otwithstanding any other provision of law," *see id.* § 1785(h). The legislative history indicates that the Congress that enacted the 1977 amendment did not view that particular provision as overturning what was then the agency's policy against combining credit unions with dissimilar common bonds, *see* H.R. Rep. No. 23, 95th Cong., 1st Sess. 12 (1977), while the Congress that enacted the 1982 provision intended for it to apply notwithstanding any field of membership or geographic restrictions, or any "requirements of state law." S. Rep. No. 536, 97th Cong., 2d Sess. 8, 50-51 (1982). Nothing more can be gleaned from that legislative history.

The Banks nevertheless contend that a statement made to a committee of Congress in 1981 by the then-Chairman of NCUA somehow constitutes additional legislative his-

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[8] The Banks rightly do not contend that the statutory language of either the 1977 or 1982 amendments (codified at 12 U.S.C. §§ 1757(14), 1785(h)) conflicts with NCUA's interpretation of the common bond provision. Rather, the Banks divine such a conflict solely from the legislative history of those amendments.

[9] *See United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history."); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

tory that illuminates the intent of the 1934 Congress that enacted Section 109. This testimony is not legislative history at all, and is of no help in the interpretive inquiry now before the Court. *See supra* at 8. In any event, the Chairman's testimony simply clarified that NCUA could not "combine credit unions with unlike fields of membership."[10] The term "field of membership" refers to the definition of a credit union's membership, and there are different types of fields of membership based on the different clauses in Section 109: "occupational" or "associational" fields, based on the common bond clause, and "community" fields based on the "community" clause. Thus, when Mr. Connell stated that NCUA could not combine credit unions "with unlike fields of membership," it is quite likely that he was referring to NCUA's interpretation—which it maintained even after the multiple group policy—that a credit union could not combine community groups together with occupational or associational groups. *See* 54 Fed. Reg. 31,170 (1989).

A year later, Congress enacted Section 1785(h)—which the Banks neglect to note was enacted *after* NCUA promulgated its multiple group policy—authorizing emergency mergers "[n]otwithstanding any other provision of law." 12 U.S.C. § 1785(h). The most that can be said of this amendment from the Banks' perspective is that Congress wished to authorize such mergers notwithstanding any present or future agency field of membership policy or other regulation, and notwithstanding any other provision of state or federal law. If Congress intended in 1982 to clarify the scope of the common bond provision, to express disapproval of NCUA's then-existing multiple group policy, or to dictate future agency policy in this area, it could have done so directly, by amending Section

[10] *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 109 (1981) (statement of Lawrence Connell, Jr.). *See also id.* at 112 (written statement noting that "[t]he main obstacle to expeditious merger action is the prohibition against combining credit unions with unlike fields of membership.").

109. It did not do so, and in fact did not even discuss Section 109. The subsequent legislation therefore sheds no light on the question before the Court in this case.

5. The Banks have the burden of showing that Congress "unambiguously expressed [its] intent" that the groups comprising a federal credit union must share a single common bond, rather than each group having its own common bond. *Chevron*, 467 U.S. at 842-843. The Banks do not carry that burden by analyzing the actual language of the common bond provision, which has been given widely disparate readings by the various courts that have considered it. *See* NCUA Br. at 33. Nor do the Banks argue that the purpose of the provision shows Congress' unambiguous intent, confessing instead that "[w]e do not know Congress's complete or precise purposes" for the common bond provision. Resp. Br. at 19. *See also First City Bank*, 111 F.3d at 439 ("we do not pretend to know the rationale behind the common-bond requirement"); Pet. App. 3a ("Congress did not fully explicate the purpose or limits of that provision").

That leaves the Banks relying on legislative history to show an "unambiguously expressed intent"—a heavy burden in any case, but particularly daunting in the face of ambiguous statutory text. When it turns out that the history is primarily of different statutes—both prior and subsequent to the FCUA—and largely hearing testimony rather than actual legislative action, it becomes clear that the Banks cannot carry their burden under *Chevron*.

Given that the statutory language does not unambiguously resolve the precise question at issue here, the Court has a clear choice before it: it can, as *Chevron* dictates, defer to the interpretation of the agency authorized to administer the statute, or it can, as the Banks prefer, defer instead to gleanings from snippets of legislative history, hearing testimony, and post-enactment committee reports. The correct choice is clear. *Chevron* holds that "when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable

content to the statute's textual ambiguities." *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 933 (1990). No similar authority has been, or could be, given to committee staff members, individual legislators, or hearing witnesses—much less those who served nearly fifty years after the statute was enacted. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 710-725 (1997) (noting the serious separation-of-powers concerns that exist when Congress delegates resolution of statutory ambiguities to legislative history rather than to administrative agencies). Accordingly, in the event the Court were to find that the Banks have prudential standing, it should uphold NCUA's indisputably reasonable interpretation of ambiguous statutory language.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
PETITIONER

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

AT&T FAMILY FEDERAL CREDIT UNION, ET AL.,
PETITIONERS

v.

FIRST NATIONAL BANK & TRUST CO., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

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26 pp

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REPLY BRIEF FOR THE NATIONAL CREDIT UNION ADMINISTRATION

Respondents have largely abandoned the reasoning of the court of appeals on both issues: their standing to sue under the Federal Credit Union Act (FCUA) and the meaning of the common bond provision of 12 U.S.C. 1759. Instead, they proffer alternative grounds for affirmance that equally lack merit.

First, respondents maintain that this Court's zone-of-interests decisions confer standing on a competitor to challenge any limitation imposed on a regulated industry within the financial services sector so long as the plaintiff competes with the regulated industry and suffers injury by virtue of that competition. This Court's cases, however, have consistently rejected conflating the injury sustained by a competitor with the examination of whether Congress intended the putatively injured party to be within the "zone of interests" of the statutory provision at issue. Next, respondents seek to establish Congress's concern with the competitive injury to banks in its enactment in 1932 of the District of Columbia Credit Union Act, and then impute that legislative concern to Congress's passage two years later of the FCUA. Yet nothing in the language or history of the FCUA supports respondents' assertion that Congress was concerned about the competitive consequences to banks of encouraging credit unions. Rather, Congress intended to enact a law that would provide a means of promoting cooperative credit unions as widely and rapidly as possible—in large part because it believed that actions by banks had contributed to the severity of the Great Depression.

With respect to the merits, respondents maintain that Congress's purpose in enacting the common bond provision was to limit each occupational credit union to all "members" who must "share" a "single" common bond. Resp. Br. 12. They make only the slightest effort to analyze the language of Section 1759 that Congress actually enacted, instead reiterating a textual argument that has

been rejected by every court to consider it. The statutory language, "groups having a common bond of occupation," does not unambiguously foreclose the agency's interpretation that each group may have its own common bond. Respondents seek to draw support for their reading of the common bond provision with a recitation of legislative history from a statute enacted in 1982 that broadened the NCUA's power to merge economically distressed occupational and geographical credit unions. But respondents' depiction of post-FCUA enactment legislative history is both inaccurate on its own terms and irrelevant to whether Congress intended the FCUA to prohibit the NCUA from promulgating its 1982 common bond policy.[1]

1. As we explain in our opening brief (Gov't Br. 17-18), the test for whether the banks have standing to challenge the NCUA's action is whether "their commercial interest was sought to be protected by the [common bond provision]—the specific provision which they alleged had been violated." *Bennett* v. *Spear*, 117 S. Ct. 1154, 1167 (1997). Respondents do not contest that statement of the governing law—indeed, they nowhere articulate (Resp. Br. 15-27) what they believe the appropriate test to be for generally establishing "zone of interests" standing. Instead, they build their standing argument on three faulty

[1] Respondents assert (Resp. Br. 1-2) that the 1982 interpretation was the first time in 50 years that the NCUA or its predecessors had changed its policies with respect to the common bond provision. That assertion is untrue. In our petition for a writ of certiorari (Pet. 6 n.3) and our opening brief (Gov't Br. 7 n.5, 37 n.15), we describe a number of interpretive modifications by the NCUA and its predecessors of the common bond provision, such as allowing family members to join credit unions, permitting a person who joined a credit union to remain a member for life, allowing occupational credit unions to encompass industrial parks and shopping centers, and extending service to low-income groups. Held against the standard respondents set, each of those policies permit occupational credit unions to have multiple common bonds, yet respondents do not challenge those regulations as impermissible under Section 1759.

premises: first, that this Court's zone-of-interests cases stand for the proposition that any competitor who suffers injury has standing to challenge agency action regarding a "limitation[]" imposed by statute in the financial services sector; second, that the common bond provision imposes a "competitive boundar[y]" (*id.* at 20) between credit unions and banks; and third, that Congress was, in fact, concerned about the competitive effect on banks when it enacted the FCUA in 1934.

a. Respondents do not defend the court of appeals' broad "suitable challenger" doctrine, pursuant to which a party "who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect." Pet. App. 24a. As we explained in our opening brief (Gov't Br. 22-25), that test constitutes an unwarranted expansion of this Court's zone-of-interests decisions because it examines whether a suit brought to challenge agency decisions has an *effect* consistent with the congressional provision rather than whether Congress *intended* the statutory provision at issue to protect the interests of the plaintiff. See, *e.g.*, *Bennett*, 117 S. Ct. at 1167; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990). Respondents suggest that this Court's decisions involving the financial services sector in effect create a different standard for zone-of-interests standing. They assert that, because the results of some of this Court's standing cases have enabled competitors in certain financial services sectors "to challenge agency action permitting another type of financial institution[] to expand beyond the limitations Congress imposed on it," they, too, should have standing in this case. Resp. Br. 20. That argument, however, has at least two flaws.

First, in all of the cases cited by respondents, the intent of Congress to protect competitors of banks could be inferred from the limitation that had been imposed on

the types of services banks could perform. See, *e.g.*, *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403 (1987) (limits on banks engaging in discount brokerage business); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617 (1971) (limitations on banks performing securities-related functions); *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 155-156 (1970) (limitations on banks providing data processing services). As this Court's subsequent citations to those cases demonstrate, the Court has never abandoned congressional intent as the focal point for determining whether a party falls within the zone of interests of a particular statutory provision. See, *e.g.*, *Lujan*, 497 U.S. at 883 (citing *Clarke*); *Bennett*, 117 S. Ct. at 1161 (citing *Association of Data Processing*). Those cases do not support the proposition that this Court has abandoned a congressional intent analysis in zone-of-interests standing.

Nor do those cases stand for a related assertion advanced by respondents—that a more relaxed zone-of-interests test applies in the financial services sector, such that a competitor may challenge any alleged "loosening" by an agency of any "limitation" on the operations of the regulated entity. See Resp. Br. 16-17. Rather, the plaintiffs in those cases were found to be within the zone of interests protected by the statute because banks were attempting to encroach on functional activities conducted by other financial services groups, and Congress had clearly delineated the boundaries on which functions banks could perform. "Just as the Court found in *Association of Data Processing Service Organizations* and *Arnold Tours*, there is embodied in the antibranching rule of the McFadden Act a congressional purpose to protect competitors of national banks in order *to ensure that national banks remain limited entities*." *Clarke*, 479 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment) (emphasis added). As we explain in more detail below, the common bond provision does not in any way either limit what services a credit union may

provide or constrain how large they can become. The purpose of the common bond provision is to structure credit unions for the benefit of their members by recognizing groups that promote the financial stability of the credit union and its ability to service the credit needs of its members. No interpretation of the common bond provision by the agency would permit credit unions to compete with other financial service providers by offering services (such as data processing, travel, and discount brokerage services) that they are not authorized by statute to provide. Ultimately, respondents' position boils down to a contention that, because the agency's common bond interpretation promotes credit unions that are more economically viable, banks suffer economic injury. But respondents can point to no case from this Court for the principle that a party has standing under the Administrative Procedure Act simply because it suffers competitive injury with the regulated industry. Indeed, they cannot, "for it conflates the zone-of-interests test with injury in fact." *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 524 (1991).

b. The second erroneous assumption underlying respondents' standing argument is their allegation that the common bond was intended as a "competitive boundar[y]" (Resp. Br. 20) between credit unions and banks. As we explained in our opening brief (Gov't Br. 25-26), the court of appeals mistakenly viewed the common bond "limitation[]" as an "entry restriction[]" designed to "limit[] a credit union's customer base." Pet. App. 24a-25a. The common bond provision originated among credit union *proponents*, who perceived it as a means of quickly forming credit unions around strong groups of people already in existence. Thus, from the earliest days of the credit union movement, use of a common bond enabled credit unions to flourish and spread rapidly by making it cheaper to establish a borrower's credit-worthiness and providing a sense of cohesiveness and mutual support among members. See Gov't Br. 4; J. Burns, *Ori-*

gin of the Term Common Bond In Credit Union Usage (1979); A. Burger & T. Dacin, *Field of Membership: An Evolving Concept* 6-8 (2d ed. 1992).[2] The legislative history reflects that the common bond provision was not conceived or designed as a competitive boundary to protect banks, but rather as a means of assuring that credit unions would be as strong and economically viable as possible. Experience had demonstrated that the strength of cooperative credit unions was enhanced by such bonds.

Respondents concede that the common bond provision imposes no limit on the number of members a credit union may have (Resp. Br. 20 ("No one contends here that credit unions must be 'small entities.'")), or the number of groups a credit union may have (*id.* at 47 & nn. 32, 33). Indeed, respondents do not argue that the common bond provision imposes any geographical limitation on an occupational credit union's field of membership.

Given those concessions, respondents' explanation for the common bond provision lacks coherence. They assert that the common bond provision is a "limitation on membership," Resp. Br. 16, yet nowhere do they explain *who* is improperly obtaining credit union services under the NCUA's common bond policy. If a credit union can have a large number of members in a large number of groups spread across the country, in theory all of the groups that are being challenged in petitioner AT&T Family Federal Credit Union's field-of-membership who fall outside the putative line drawn by respondents would qualify for some credit union somewhere, even under respondent's definition of a "single common bond."[3]

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[2] Those sources have been lodged with the Clerk. See Gov't Br. 3 n.1. Burns explains that the term "common bond" first appeared in a 1914 primer on how to form credit unions, see J. Burns, *supra*, at 9, and gradually made its way into state credit union laws by the mid-1920s at the behest of credit union proponents, *id.* at 26-27.

[3] Thus, to use respondents' own example, all members of a labor union could form a credit union, wherever the workers happen to be located. See Resp. Br. 47 n.33. The same would be true for all workers who have the same occupation. See *ibid*. If respondents do have standing to challenge field-of-membership determinations and their position is upheld on the merits, the groups that likely will be the least able to form their own economically viable credit unions or to combine with like occupational groups are the small businesses and persons of small means that Congress specifically sought to help with the enactment of the FCUA. See Gov't Br. 5, 40.

That is not to say that such groupings would be economically viable, or that a complete reconfiguration of the credit union industry along the lines apparently contemplated by the banks would not cause severe disruption and economic harm. As we have noted (Pet. 27), nearly 3600 credit unions serving over 32 million people throughout the country have relied on the NCUA's multiple group common bond policy. The chartering of those multiple group credit unions is consistent with the common bond provision's purpose of providing groupings that assure the economic viability of a potential credit union. See Gov't Br. 19. That provision relates exclusively to the composition and governance of credit unions, and its inclusion in the FCUA reflects congressional concern with facilitating the formation and stability of credit unions by providing particular groupings around which credit unions may form. See S. Rep. No. 555, 73d Cong., 2d Sess. 2-3 (1934); 77 Cong. Rec. 3206 (1933) (remarks of Sen. Sheppard).

The FCUA does not guarantee membership in a credit union to all persons who have a common bond; it provides that the regulating agency shall promulgate rules for the membership of credit unions and "determin[e] * * * the economic advisability of establishing the proposed Federal credit union" before approving the organization certificate. 12 U.S.C. 1754. In legislation designed to promote the credit union movement as broadly and quickly as possible, Congress clearly did not intend for banks to be within the zone of interests of the common bond provision to challenge agency decisions about the economic

feasibility of the various groupings of persons who seek to form a credit union.

c. Even if this Court's standing decisions had created a different zone-of-interests test to apply when financial service companies challenge regulatory actions that govern their competitors and even if the common bond provision could somehow be construed as a constraint on credit union operations, as a factual matter respondents cannot demonstrate that Congress viewed banks as "competitors" of credit unions when it enacted the FCUA. The court of appeals was quite emphatic that "Congress did not, in 1934, intend to shield banks from competition from credit unions. Indeed, the very notion seems anomalous, because Congress' general purpose was to encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." Pet. App. 21a.

In the face of that categorical conclusion by the court of appeals, respondents do little more than simply assert that "the competitive interests of banks *were* among Congress's concerns when it enacted the Federal Credit Union Act." Resp. Br. 24. See also Independent Bankers Ass'n Amici Br. (Amici Br.) 16-22. Respondents' "evidence" for that assertion rests primarily on statements in committee hearings about a different bill before a different Congress made by individual members of Congress or representatives of the banking industry. But not only are those statements not part of the legislative history, and so deserving of little if any weight; they also do not in any way show that Congress intended the common bond provision to be a device to limit credit union activities for the protection of banks.

For example, respondents imply that, after bankers spoke about competition from credit unions in hearings on the District of Columbia Credit Union Act of 1932, Congress responded by retaining the common bond provision for occupational credit unions. Resp. Br. 25 (citing *Incorporation of Credit Unions: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. 25-38 (1932) (*1932 Hearings*)). As an historical matter, however, there was no relation between banks' assertion of competitive concern and Congress's inclusion of the common bond provision. First, all versions of the D.C. bill included the common bond provision—even those proposed before the bankers' testimony.[4] Second, none of the bankers testifying even referred to the common bond provision, much less urged that it be included in the legislation to protect banks' competitive interests.[5]

Respondents also argue that their concerns were "raised and addressed on more than one occasion" (Resp. Br. 26) in the legislative history of the FCUA, but can point to only two places where those interests allegedly were discussed. Those two statements note the banks' general opposition to credit unions, but give no indication that the legislators in question believed the common bond provision should be included in the bill to address the banks' competitive concerns.[6] See also Pet. App. 10a-11a;

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[4] See *Credit Unions and Small Loans: Hearings on S. 4775 and S. 5269 Before the Senate Comm. on the District of Columbia*, 71st Cong., 3d Sess. 3 (1931); *Incorporation of Credit Unions: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. 3 (1932). As the court of appeals observed, it was only after credit unions flourished that "bankers began to see the common bond requirement as a desirable limitation on credit union expansion." Pet. App. 22a.

[5] See *1932 Hearings*, *supra*, at 25-38. Rather, they objected to the ability of credit unions to accept deposits for their members, to their tax exemption, and to the requirement that credit unions deposit their money in national banks. See *id.* at 25-26. And they objected to the bill on the grounds that it would allow credit unions to compete with banks without being subject to the same laws as banks. *Id.* at 26. But respondents are incorrect to assert that the legislative history of the 1932 D.C. Act evinces any "[c]ongressional concerns that chartering credit unions could inflict an unwanted competitive injury on the commercial banking industry." Resp. Br. 25.

[6] The first, from Senator Goldsborough, takes the form of a question to credit union pioneer, Roy F. Bergengren: "Is there any opposi-

Branch Bank & Trust Co. v. *NCUA*, 786 F.2d 621, 626 (4th Cir. 1986) ("competitive interests of banks were purposefully sacrificed by Congress to the interests of facilitating credit for people of limited personal means"), cert. denied, 479 U.S. 1063 (1987); S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (Congress intended to establish national system of credit unions as quickly as possible, and viewed credit unions as "capable of rapid mass development").

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tion on the part of commercial banks to the establishment of credit unions?" to which Bergengren replies, "No; I think not. Occasionally here and there they misunderstand, but nothing serious; no." *Credit Unions: Hearings on S. 1639, S. 1640, and S. 1641 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 20 (1933). That statement hardly reflects congressional solicitude for the banks' competitive concerns, particularly since Senator Goldsborough immediately continues, "Is not your primary object to get rid of the small-loan business * * * [a]nd afford an opportunity for the borrower to borrow small sums of money at reasonable and fair rates?" *Ibid.*

The second statement cited by respondents, from Representative Luce, responds to a question whether the bill was intended "to take the place of the crop-production loans." Representative Luce simply replied that "[t]his does not in any way interfere with any of the existing loaning institutions." 78 Cong. Rec. 12,224 (1934) (Rep. Luce). His statement emphasizes his strong support for a healthy national network of credit unions:

> The growth of the unions has been a battle, a long, hard battle. It has been a battle between the men on the one hand who have taken interest in their fellows, and the loan sharks on the other. * * * In order that all parts of the country, including not only the industrial centers but also the agricultural regions, might have the benefit of this system, it was decided to ask from Congress a law that would permit the creation of these credit unions wherever they might be needed. * * * I can imagine no ground for opposition to the bill. It satisfies those who are most concerned in the welfare of this institution.

Ibid. Again, Representative Luce's statement provides no support for respondents' contention that Congress sought to address their competitive concerns by enacting the common bond provision. Nor is there any reason to think that either Senator Goldsborough or Representative Luce was in any way attempting to *limit* the growth of the very institutions that they were working so hard to promote.

Ultimately, respondents appear to admit that, in fact, the congressional intent to address their competitive concerns through the common bond provision is nowhere to be found in the legislative history of the FCUA: "It was not necessary to *debate* these competitive issues in connection with the FCUA in 1934, because they had already been addressed in the 1932 District of Columbia legislation." Resp. Br. 26-27. That assertion, however, rests on the assumptions that (1) Congress actually addressed the banks' competitive concerns through the common bond provision in 1932—which it did not; and (2) nothing happened that would preclude ascribing the intentions of the 72d Congress to the 73d Congress. In fact, however, the Democratic landslide of 1932 and continuing bank failures created a sharply different legislative climate, one in which Congress openly criticized the banking industry for its gross abuses and promptly legislated to promote the "rapid mass development" of credit unions, S. Rep. No. 555, *supra*, at 2-3, as "a happy medium between the loan shark and the bank," at a time when neither could satisfy the normal credit needs of the working class. 78 Cong. Rec. 7259 (1934) (Sen. Barkley).

d. If, as we believe, there is no basis for distinguishing zone-of-interests standing in the financial services sector from other regulated industries, the implications of the special standing test advocated by respondents are striking. Competitors would presumably have standing to challenge an agency's interpretation of a "limitation" that was strictly a self-governing mechanism placed in a statute enacted without any regard given by Congress to the competitive effects on the challenging plaintiff. That is decidedly not the import of this Court's zone-of-interests jurisprudence.

2. With respect to the merits, respondents assert (Resp. Br. 33) that the NCUA's construction of Section 1759 is foreclosed by "[t]he natural reading of this provision." Nonetheless, they do not defend the court of appeals' explanation for why the statute is purportedly

"unambiguous." As we make clear in our opening brief (Gov't Br. 29-33), the court of appeals erred in concluding that the statutory language was unambiguous by finding the words "common bond" redundant with the word "groups" in Section 1759 and comparing the two field-of-membership phrases in Section 1759 ("groups having a common bond of occupation" and "groups within a well-defined neighborhood").

Respondents instead make three different arguments on the merits. They reiterate the grammatical argument they advanced below (which was rejected by the court of appeals), argue that Congress "rejected" the NCUA's common bond interpretation in legislation passed in 1982, and submit legislative history on the ostensible purposes behind the common bond provision. Those contentions are without merit.

a. Like the court below (Pet. App. 10a), respondents are unable to make a textual argument about the plain meaning of the words "[f]ederal credit union membership shall be limited to groups having a common bond of occupation or association" without changing the word "groups" to "members," "having" to "sharing," or inserting the words "single" or "one" before "common bond." See Resp. Br. 2, 6, 12, 13, 14, 33, 37, 38, 43; Amici Br. 14, 15.

Respondents reiterate in this Court their assertion that, because credit union membership is "limited" to groups having "a" common bond of occupation or association, the language of the common bond provision requires the conclusion that members of a credit union must have only "one—unifying 'common bond.'" Resp. Br. 33. Both the court below and the Sixth Circuit in *First City Bank* v. *NCUA*, 111 F.3d 433, 437-438 (1997), petitions for cert. pending, Nos. 96-2018 & 97-100, rejected that syntactical argument as unconvincing. See Gov't Br. 13 n.8, 31. The court of appeals in this case correctly held that "[t]he article 'a' could as easily mean one bond for each group as one bond for all groups in [a federal credit union]." Pet. App. 6a. That is because the article "a" appears in the middle of the participial phrase "having a common bond," which describes the plural noun "groups." See Gov't Br. 30-32. Respondents neither articulate why that syntactical explanation for the phrase's inherent ambiguity is unsound nor offer any contrary view that takes into account the actual words of the statute, arranged in the way Congress actually positioned them.[7]

Confining their textual analysis about the statute's "plain" meaning to three sentences (Resp. Br. 33), respondents devote more of their brief to a contextual argument that essentially goes to the reasonableness of the agency's construction of the phrase "groups having a common bond of occupation." They reiterate the grammatical mistake of the court below and of the Sixth Circuit by maintaining that the phrase "groups having a common bond" is analogous to the adjoining phrase "groups within a well-defined neighborhood, community or rural district." Resp. Br. 37; see also Amici Br. 15-17. But, as we demonstrate in our opening brief (Gov't Br. 31-32), the prepositional phrase "groups within a well-defined neighborhood" has a syntactical clarity that is absent in the participial phrase "groups having a common bond" because the word "within" necessarily limits all constituent groups to a single geographical area, whereas modification of the plural noun "groups" with the parti-

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[7] The Independent Bankers Association attempts to take issue with our grammatical analysis, see Amici Br. 16, but its argument misapprehends the relevant grammatical rule. Our point is not that there is a relevant distinction between a "restrictive" and "non-restrictive" participial phrase in Section 1759, but rather that the use of a singular participial phrase to describe a plural noun does not unambiguously clarify whether all of the groups, or each one individually, must be characterized by the participial phrase that describes them as "having a common bond." As we point out in our opening brief (Gov't Br. 31 n.11), phrases with that construction, such as "groups having a common religion," do not make clear whether each group must have the same religion, or whether all of the groups being so described must have the same religion.

cipial phrase "having a common bond of occupation" does not unambiguously foreclose the possibility that each group can have its own common bond. Thus, the language of the two clauses cannot properly be described as "functionally parallel." See Resp. Br. 37.

To bolster their textual argument, respondents erroneously contend that the test for assessing the ambiguity of statutory language is whether "Congress *intended* to be ambiguous." Resp. Br. 32 (emphasis added). Nothing in *Chevron* or its progeny stands for such a sweeping proposition. Indeed, *Chevron* explicitly rejects such an approach: "[I]t is entirely appropriate for [an agency] to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984). In *Chevron* the Court could not discern the actual intent of Congress in drafting the ambiguous language at issue. *Id.* at 861-862. Because Congress has not directly foreclosed the possibility that the phrase "groups having a common bond of occupation" in Section 1759 means that each group may have its own common bond, this Court should "not substitute its own construction of a statutory provision for a reasonable interpretation made by the" NCUA. *Id.* at 844. See also *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1734 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency," even when the agency changes its position).

Nor is the NCUA's construction made unreasonable by respondent's contention that "every employee of every company" could join the same credit union. Resp. Br. 33. First, the common bond provision does not by its terms or purpose constitute the sole limitation on what groups may join a credit union; other provisions of law apply as well. See, *e.g.*, 12 U.S.C. 1754 (general conformity to pro-

visions, general character and fitness to join, and economic viability as determined by the Board), 1785(b) (restrictions on merger or consolidation of existing credit unions). Moreover, there is no reason to think that the NCUA would permit such a monopoly, because to do so would be inconsistent with its goals of "mak[ing] quality credit union service available to all eligible groups who wish to have it" and granting charters to "any group or combination of groups" so long as "its chartering will not materially affect the interests of other credit unions or the credit union system." NCUA, *Chartering and Field of Membership Manual* 1-1 (June 1996). Indeed, given the historical development of the country's 7200 federal credit unions, the purposes behind a system of "cooperative" credit (12 U.S.C. 1752(1)) would be defeated by actual implementation of respondent's *reductio ad absurdum* position.

b. Respondents assert (Resp. Br. 38-43) that light can be shed on the "unambiguity" of the common bond provision by Congress's enactment in 1982 of amendments to the FCUA, which allow for the emergency merger of an insured failing credit union into a healthy credit union "[n]otwithstanding any other provision of law." 12 U.S.C. 1785(h). That argument conveys a greatly mistaken understanding of the language in that statutory provision, the reasons why Congress adopted it, and the legal relevance of that provision in this case.[8]

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[8] Respondents also erroneously contend (Resp. Br. 39-40) that legislative history to a 1977 amendment to the FCUA bears on the meaning of the common bond provision. First, it is axiomatic that the views of a subsequent Congress are irrelevant to discerning the meaning of statutory language enacted by a prior Congress. See, *e.g.*, *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 185 (1994). Second, nothing in the amendment actually enacted by Congress altered the common bond provision in any way. See Pub. L. No. 95-22, § 303(e), 91 Stat. 51, codified at 12 U.S.C. 1757(14). Finally, Congress's failure to overturn the NCUA's 1982 common bond policy despite numerous subsequent amendments to the FCUA is evidence that

First, the NCUA's promulgation of the common bond policy at issue in this case *predated* Congress's enactment of the emergency merger legislation.[9] The NCUA's modification was published in the Federal Register six months before Congress enacted the 1982 FCUA amendments. Not only did Congress do nothing to alter the NCUA's policy, it evidently concluded that the NCUA's policy change did not eliminate the problem Congress sought to address. That problem was not, as respondents

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Congress does not view that policy as unreasonable. See Gov't Br. 43-48.

[9] The timing of the adoption of the NCUA's multiple group policy and the enactment of emergency merger authority support the conclusion that the legislation was necessary even though the NCUA interpreted the common bond provision to permit multiple groups, each with its own common bond, within a single occupational credit union. The NCUA introduced the multiple group policy in April 1982. Interpretive Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16,775 (1982). Six months after the adoption of that policy, Congress conferred emergency merger authority on the NCUA. Garn-St Germain Depository Institutions Act of 1982, § 131(h), 12 U.S.C. 1785(h) (enacted Oct. 15, 1982). In 1983, Chairman Callahan sent a detailed letter outlining the multiple group policy to Chairman St Germain, the author of the bill that provided temporary emergency merger authority. J.A. 31. Between 1982 and 1987, when the emergency merger authority was made permanent, the NCUA issued several Interpretive Ruling and Policy Statements (IRPS) revising its multiple group policy. See IRPS 82-3, 47 Fed. Reg. 26,808 (1982); IRPS [illegible], 49 Fed. Reg. 46,536 (1984); IRPS 84-1, 49 Fed. Reg. 49,432 (1984). It also conducted a detailed field of membership study. NCUA, *Field of Membership Study* (June 26, 1984). During this period, the American Bankers Association testified before Congress on several occasions and specifically complained of the multiple group policy and the erosion of the common bond. Despite congressional awareness of the NCUA's policy and numerous complaints from the banking industry, Congress never amended the common bond provision. See Gov't Br. 44 n.17. It made the emergency merger provision permanent in 1987, providing broad authority for use in extreme situations. Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 509, 101 Stat. 635. The permanent authority does not amend the common bond language found in 12 U.S.C. 1759, but allows the NCUA to merge credit unions without regard to any state or federal law in emergency situations.

argue (Resp. Br. 41-42), a congressional discomfort with credit unions' having multiple occupational common bonds. Rather, the statutory amendments were necessary because the NCUA did not theretofore have the statutory authority to merge a failing occupationally-based credit union into a financially strong community-based credit union, or a failing community credit union into a credit union having a common bond of association. The language in 12 U.S.C. 1785(h) does not provide emergency merger relief "notwithstanding the common bond provision of Section 1759." It says "notwithstanding any other provision of law," and thereby permits such mergers without regard to *any* other limitation imposed by the FCUA. See App., *infra*, 1a.[10] Because the NCUA has never interpreted Section 1759 to authorize a credit union to consist of occupational/associational groups and community-based groups (except for low-income groups, see Gov't Br. 37 n.15), Chairman Connell's statement at the 1981 hearing should be read as consistent with the understanding that, without the emergency merger authority, the NCUA was unable to combine occupational credit unions with associational-or community-based ones without regard to geographic restrictions, other restric-

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[10] Contrary to respondents' assertions, that provision gives the NCUA considerably more discretion to facilitate mergers in emergency situations than if the NCUA were to ignore the common bond provision as construed by respondents. The legislation allows mergers of community credit unions with occupational or associational credit unions and eliminates any requirement for geographic proximity between the merging credit unions. See, *e.g.*, S. Rep. No. 536, 97th Cong., 2d Sess. 8 (1981) (emergency merger relief permits mergers "without any restrictions as to field of membership or geographic area"). It also allows the NCUA to ignore the factors set forth in 12 U.S.C. 1785(c), which normally must be considered in approving mergers. Finally, it eliminates any obstacles to mergers that may be contained in other federal or state laws. The full language of Section 1785(h) is set forth in App., *infra*, 1a.

tions under 12 U.S.C. 1785(c), or other federal or state law.[11]

Because the emergency merger relief enacted by Congress in 1982 did not amend the common bond provision itself, and was enacted after the introduction of the NCUA's multiple group policy, it did not limit the NCUA's discretion to interpret the ambiguities in the provision in accordance with the demands of changing circumstances. See *Smiley*, 116 S. Ct. at 1734. As this Court has explained, "an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." *Chevron*, 467 U.S. at 865. The reasonableness of the NCUA's interpretation is further supported by the numerous instances in which Congress has considered the banks' complaints about the agency's policy but done nothing to overturn it, especially in the many statutory enactments that followed the 1982 emergency merger legislation. See Gov't Br. 43-48. Respondents have

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[11] Respondents quote only from Chairman Connell's informal spoken remarks at the hearing. His written statement on that point read: "While NCUA in no sense would advocate retreating from the longstanding principles of field of membership uniqueness, a relaxation of those requirements in situations involving financially distressed institutions would be an important stabilization tool." *Competition and Conditions in the Financial System: Hearings Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 97th Cong., 1st Sess. 112-113 (1981) (*1981 Hearings*). A "field of membership" refers to the membership in a federal credit union, which is characterized by the three organizing principles provided in Section 1759: occupational, associational, or community. See NCUA, *Chartering and Field of Membership Manual* 1-1, 2-7 (June 1996). Moreover, none of the 15 amendments to the FCUA that Chairman Connell proposed in his testimony involve the multiple group common bond issue. See *1981 Hearings*, *supra*, at 117-118. It is, therefore, incorrect of respondents to assert that, in speaking of multiple fields of membership (*e.g.*, community, occupational, and associational), Chairman Connell intended to express any view at that hearing on the issue of multiple common bonds of occupation. See Resp. Br. 40.

nothing to say about that legislative history, but rather attempt to dismiss its legal significance by misstating our position. We do not, as respondents assert, "make[] an extended argument that * * * [Congress] * * * has ratified NCUA's position as a *policy* matter." Resp. Br. 48. Our point is that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction." Gov't Br. 47 (quoting *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985)).

c. Finally, respondents contend that the legislative history supports their view that Congress intended credit unions to be limited to a single common bond. Resp. Br. 43-50. They argue that Congress relied on Roy Bergengren's descriptions of "typical" credit union practice when enacting the FCUA and "intended to authorize only credit unions that adhered to the existing model of 'typical credit unions' as Bergengren described them." *Id.* at 44. First, respondents can cite no evidence that Congress intended to constrain credit unions for all time to what they were "typically" like in the 1930s. Indeed, such an intention would be anomalous in light of Congress's expressed purpose of spreading cooperative credit to as many people as possible. See Gov't Br. 5. Moreover, even assuming Congress intended to rely on Bergengren's vision of what a credit union could be, he himself did not have the limited understanding of a "group" that is ascribed to him by respondents. Bergengren merely testified, for example, that the common bond was a feature of the groups that formed credit unions: "every credit union is organized within a limited and given group of people. And it may have to do only with the members of that group." *1933 Hearings*, *supra*, at 15. But Bergengren himself emphasized that, as an organizing principle, "[t]he group significance is varied." *Id.* at 16. Depending on the need and inclination of prospective members, he observed, credit unions could be organized around "church parishes, * * * factories, in

mills, stores, in public service corporations, in the United States Post Office." *Ibid.*; S. Rep. No. 555, *supra*, at 2 ("employees of a given industry, farmers in a given district, members of a church parish, employees of the United States Government, groups within a well-defined neighborhood, small community or rural district, etc."). A credit union could have thousands of members, or be relatively small; it could consist of the employees of a single corporation, or the employees of many different businesses. See *1933 Hearings*, *supra*, at 16-17, 24. But what Congress understood about the common bond feature was that it provided the cement that held credit union members together and facilitated their "rapid mass development." S. Rep. No. 555, *supra*, at 2.

In numerous ways since the FCUA's enactment in 1934, the NCUA and its predecessors have modified their interpretation of the common bond provision. They have appropriately exercised the discretion afforded by Congress to define what constitutes a common bond and to determine whether the groups that seek to form or join a credit union can be characterized as "having a common bond of occupation." The NCUA's interpretation is consistent with Section 1759's language and purposes. Congress did not, as respondents suggest, intend the common bond provision to fetter the growth and development of federal credit unions.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the decisions of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

AUGUST 1997

APPENDIX

12 U.S.C. 1785(h) provides as follows:

Emergency merger

Notwithstanding any other provision of law, the Board may authorize a merger or consolidation of an insured credit union which is insolvent or is in danger of insolvency with any other insured credit union or may authorize an insured credit union to purchase any of the assets of, or assume any of the liabilities of, any other insured credit union which is insolvent or in danger of insolvency if the Board is satisfied that—

(1) an emergency requiring expeditious action exists with respect to such other insured credit union;

(2) other alternatives are not reasonably available; and

(3) the public interest would best be served by approval of such merger, consolidation, purchase, or assumption.

Nos. 96-843 & 96-847

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
v.
FIRST NATIONAL BANK AND TRUST COMPANY, *et al.*,
Respondents.

CREDIT UNION NATIONAL ASSOCIATION, *et al.*,
Petitioners,
v.
FIRST NATIONAL BANK AND TRUST COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CONSUMER FEDERATION OF AMERICA, INC., AND U.S. PUBLIC INTEREST RESEARCH GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF CONSUMER FEDERATION OF AMERICA, INC., AND U.S. PUBLIC INTEREST RESEARCH GROUP, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

This *amici curiae* brief is submitted in support of the petitioners, the National Credit Union Administration ("NCUA") and Credit Union National Association, et al. ("CUNA").* By letters filed with the Clerk of the

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* Only undersigned counsel authored this brief. CUNA is a member of *amicus curiae* Consumer Federation of America, Inc.

Court, Petitioners NCUA and CUNA, and Respondent First National Bank and Trust Co., et al., have consented to the filing of this brief.

INTERESTS OF *AMICI CURIAE*

The Consumer Federation of America, Inc. ("CFA") is a nonprofit organization incorporated under the laws of New York and exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code. Organized in 1967, CFA is a federation of 240 local, state and national consumer groups throughout the United States representing more than 50 million members. CFA gathers facts, analyzes issues and disseminates information to the public, Congress and federal agencies to provide a voice for the concerns of consumers, particularly those of limited means who are least able to speak for themselves. CFA represents the American consumer on a variety of issues that affect their daily lives, including financial issues. CFA has resolved to support a strong, independent, consumer-owned and -controlled credit-union system.

The U.S. Public Interest Research Group, Inc. ("U.S. PIRG") is a nonprofit organization incorporated under the laws of the District of Columbia and exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code. Organized in 1983, U.S. PIRG is the national lobbying office of all State PIRGs. Its purposes include the identification of problems and advocacy of solutions on a variety of issues by conducting research, analysis, testing and investigation, publishing information and providing public education on such issues, including consumer protection. The leading issue in U.S. PIRG's current legislative agenda on consumer protection involves financial services, and it has for years advocated the advantages of joining credit unions.

SUMMARY OF ARGUMENT

Congress first authorized the federal chartering of credit unions in 1932, in its capacity as legislature for the District of Columbia. When granting to the D.C. Commissioners the power to approve the first federal credit unions, Congress did so understanding that the D.C. Commissioners desired to have "absolute discretion as to the . . . size" of each credit union, considering the unit's proposed "field of membership" (including the common-bond requirement). Acting for the nation in 1934, Congress essentially adopted the 1932 statute, but in setting forth considerations for the new (federal) regulatory agency, substituted "economic advisability" for the narrower "field of membership" when addressing the scope of that agency's approval authority. A generation later, Congress maintained its interest in encouraging the growth of federal credit unions by creating in 1970 an independent agency for their regulation. Congress evidenced its determination to advance these units by empowering an increasingly capable regulatory authority to approve applications based on their economic prospects for success, which the National Credit Union Administration ("NCUA") has done in approving multiple-employer groups.

The underlying purpose of these enactments was to provide the unique advantages of credit unions to the nation's working men and women through federal chartering. Credit unions, as cooperative nonprofit organizations of consumers overseen by volunteers from their own ranks, offer the opportunity for self-help that puts service before profit and helps affirm the democratic value of voluntary associations for mutual support, observed with lasting influence by Alexis de Tocqueville but slipping from modern society's grasp. The more traditional, economic advantages of such institutions in the form of favorable rates, yields and fees provided to their members is especially vital to underserved communities where credit unions are the only source of reasonable financial assist-

ance, and has the further consequence of restraining the cost and enhancing the gain of comparable products provided elsewhere in the financial marketplace. The provision of these social values and economic benefits fulfills the historic purpose that began in the Depression-era Congress, and NCUA's approval of multiple-employer groups is an important means by which the agency has been faithful to its legislative charge.

ARGUMENT

I. THE 1934 ACT EXPANDED THE BROAD DISCRETION, GRANTED BY THE 1932 ACT TO THE AGENCY THAT REGULATES FEDERAL CREDIT UNIONS, TO APPROVE APPLICANTS BASED ON THE LIKELIHOOD OF THEIR ECONOMIC SUCCESS, A DISCRETION REINFORCED IN THE 1970 ACT WHICH MADE THAT AGENCY INDEPENDENT.

The Federal Credit Union Act of 1934, Pub. L. No. 73-467, 48 Stat. 1216 (June 26, 1934) ("FCUA"), was based largely on the statute passed by the previous Congress, the District of Columbia Credit Unions Act of 1932, Pub. L. No. 72-190, 48 Stat. 326 (June 23, 1932) ("DC Act"). In the DC Act, Congress chose to grant to the agency assigned to regulate credit unions (the Commissioners of the District of Columbia) a broad discretion to approve any credit union certificate presented to it that, *inter alia*, demonstrated the "advisability of establishing a credit union in the proposed field of membership." *Id.*, § 4(3), 48 Stat. 327.

In the FCUA, Congress expanded that discretion by removing the reference to "proposed field of membership," which incorporates the "common bond" requirement now before the Court, and replacing it with the broader criterion of the "economic advisability of establishing the proposed Federal credit union." *Id.*, § 4(3), 48 Stat. 1217, 12 U.S.C. § 1754(3). These enactments reflect the

increasing Congressional emphasis on regulatory consideration of economic conditions that support the current interpretation of "common bond" by the National Credit Union Administration ("NCUA"), a proposition advanced by the enhancement of regulatory authority when Congress created NCUA in 1970.

The 1934 Senate Report on the bill (S. 1639) that became the FCUA stated: "[T]he 1932 Congress enacted such a law for the District of Columbia (*which supplies the basis for part I of this Senate bill 1639*, and establishes a precedent for Federal credit unions)." S. Rep. No. 555, 73d Cong., 2d Sess., at 2 (1934) (emphasis added). In the process of passing the DC Act in 1932, the contributions of the D.C. Corporation Counsel's office had pursuasive weight on the Congress, *see, e.g.*, H.R. Rep. 2908, 71st Cong., 3d Sess., at 1 (1931) (Corporation Counsel submission on credit-union history was "brilliantly discussed").

During hearings on the DC Act, the Office of the Comptroller of the Currency ("OCC") unsuccessfully opposed the legislation, maintaining that the District of Columbia had become "very much 'overbanked.'" *A Bill to Provide for the Incorporation of Credit Unions in the District of Columbia: Hearings on S. 1153 Before the Senate Comm. on the District of Columbia*, 72d Cong., 1st Sess. at 6 (1932) ("1932 Senate Hearings on DC") (letter from Comptroller of the Currency Polk, Jan. 15, 1932). The Comptroller also objected to the power granted the D.C. Commissioners to approve credit-union organization certificates, seeking "complete discretion" over such matters in the OCC. *Id.*, at 7.

However, the Assistant Corporation Counsel of the District of Columbia opposed granting "blanket discretion" without specifying particular matters to be considered. *Id.*, at 16 (statement of Mr. Roberts). Two weeks later, Corporation Counsel offered an amendment in which the

Commissioners retained ultimate authority to approve the certificates, but were authorized to refer applications to OCC for a report on, *inter alia*, "the advisability of establishing a credit union in the proposed field of membership." *Id.*, at 23, 40. This amendment was enacted as Section 4 of the DC Act. Commenting on the amendment, Mr. Roberts stated:

> In the amendment that was prepared by the commissioners, the Senator will note that *the commissioners have absolute discretion as to the unit, the size of the unit*, which they will allow to be the source of the membership of the given credit union at the time of its incorporation, and they may refer the matter to the Comptroller of the Currency for reports as to . . . (3) the advisability of establishing a credit union in the proposed field of membership. *1932 Senate Hearings on DC*, at 40.

Testimony immediately following addressed the exercise of discretion whether a hypothetical credit union might be too large a unit in the *District of Columbia, id.*, but discretion can operate both ways as the regulatory agency seeks to foster the growth of private institutions designed, as the next Congress made clear, to "make *more available* to people of small means credit for provident purposes through a *national system* of cooperative credit . . . ." 48 Stat. 1216 (1934), 12 U.S.C. § 1751 (emphasis added). In consequence, the agency was given a wide discretion to create that system.

In that next Congress, Senator Sheppard introduced a bill (S. 1639) which would, in § 4, have substituted for the D.C. Commissioners the "Federal Reserve bank in the district indicated in the organization certificate," while retaining the identical criterion for approval of such certificates regarding the "advisability" of their "proposed field of membership." S. 1639, 73d Cong., 1st Sess. at § 4 (May 11, 1933). The House Committee on Banking

and Currency favorably reported S. 1639 with an amendment that changed § 4 of the Senate version by substituting the "economic advisability of establishing the proposed Federal Credit Union" for the narrower criterion contained in the DC Act, the "proposed field of membership." H.R. Rep. No. 2021, 73d Cong., 2d Sess. at 2 (1934).

The change in § 4 also substituted the Farm Credit Administration for one of the Federal Reserve banks as the agency to regulate federal credit unions, *id.*, as was explained by Congressman Steagall, the floor manager of the bill in the House and Chairman of the House Committee on Banking and Currency. He stated that to "those interested in framing the bill," the Farm Credit Administration was the "most experienced branch [of the executive] in the matter of cooperative credit." 78 Cong. Rec. 12224 (1934) ("1934 House Debate"). There appears to be no similar explanation for the other change in § 4 regarding the substitution of the new criterion, "economic advisability." Section 4 was enacted as so amended.

The change in statutory language, from both the DC Act and the Senate bill, substitutes general "economic" considerations for specific "field[s] of membership" that include common-bond proposals. Such a change on its face would appear to modify the terms of the agency's discretion so that in the end, the regulatory agency was required to construe the field of membership such that no certificate would be issued unless it were found to be economically viable.

The NCUA—ultimate successor to the Farm Credit Administration—is thereby freer under the FCUA to consider contemporary economic uncertainties such as corporate and government downsizing, plant closings, insolvencies, mergers and acquisitions in determining the prospective viability of a proposed federal credit union, and freer to approve multiple-employer groups as a method to

minimize such risks to the proposed unit, than the Commissioners would have been under the DC Act. The discretionary power granted NCUA's predecessor under the 1934-amended § 4 of the FCUA is thus harmonized with the agency's current interpretation of "common bond" under the 1932-established content of that requirement in § 9, particularly in light of the compelling public policy manifested in the 1934 statute to encourage the proliferation of these uniquely American institutions for the benefit of the "masses" of people in the United States. *See* Part II, *infra*.

The creation of NCUA as an independent agency in 1970, Act to Amend the FCUA, Pub. L. No. 91-206, 84 Stat. 49 (Mar. 10, 1970) ("1970 Act"), generally reinforced the broad discretion granted in the 1930's to the agencies that became successively responsible for approving federal credit unions (as distinct from those chartered by the several States). An important link in this continuity is the role of Congressman Wright Patman, who as chairman of the House Banking and Currency Committee in 1969 introduced the bill (H.R. 2) that became the 1970 Act. *See* S. Rep. No. 518, 91st Cong., 1st Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. at 2479. Thirty-five years earlier, Congressman Patman had also been the sole House sponsor of the bill that became the FCUA in 1934, along with "every piece of Federal credit union legislation" in between. 115 Cong. Rec. 20884 (1969) ("1969 House Debate") (remarks of Cong. Patman).

After noting credit-union innovations for military servicemembers and students, Congressman Patman stated that H.R. 2 was designed so that such programs "can be more readily put into operation," notwithstanding the fact that there had already been a "tenfold increase in the number of credit unions since the time the [FCUA] was passed." 1969 House Debate, at 20884-5 (including State credit unions). His views reflected those of his committee, which, in favorably reporting H.R. 2 by unanimous vote, *id.* at 20885, expressed concern about the "growth of the Federal credit union movement" without an independent regulatory agency like NCUA. H.R. Rep. No. 331, 91st Cong., 1st Sess., at 3 (1969) ("1969 House Report"). Similar views about the purpose of the 1970 Act were expressed by others, *e.g.*, Congressman Barrett ("we can expect the continued advancement of the credit union program" under an independent agency, 1969 House Debate, at 20888); *cf.* Congressman Minish (independent agency will have more "credit union expertise," *id.* at 20890) (capabilities which the FCUA had tried to ensure by designating the Farm Credit Administration as the regulator of federal credit unions, *see* 1934 House Debate, at 12224).

In these three enactments, Congress moved in 1932 from granting to the D.C. Commissioners "absolute discretion as to the . . . size" of a federal credit union that had proposed a field of membership in the District of Columbia, to 1934 when it extended such discretion to the Farm Credit Administration in assessing the less restrictive "economic advisability" of federal applications nationwide, to creating the NCUA in 1970 so that the new agency could "more readily" establish such credit unions and thereby secure the "growth" and "advancement" of them. In this evolution, Congress expressed a consistent encouragement to expand the availability of, as Senator Yarborough called it in debating the passage of the 1970 Act, "the credit union movement, one of the most important forms of economic democracy, of mutual aid and self-help, in the Nation." 116 Cong. Rec. 2431 (1970).

II. UPHOLDING THE AGENCY'S DISCRETIONARY POWER TO APPROVE MULTIPLE-EMPLOYER GROUPS OF FEDERAL CREDIT UNIONS WILL SERVE THE PUBLIC PURPOSE OF THE CONGRESS TO EXPAND THE AVAILABILITY OF THE UNIQUE COMBINATION OF SOCIAL AND ECONOMIC ADVANTAGES PROVIDED BY THESE ORGANIZATIONS.

The FCUA reflects the two primary advantages of federal credit unions—economic and non-economic, or social—that underlie the statute's interest in their "growth," both contained in its preamble to "make more available . . . a national system of *cooperative* credit . . . ." 48 Stat. 1216 (1934), 12 U.S.C. § 1751 (emphasis added).

The less obvious advantage is found in the combination of features that make federal credit unions unique as organizations in the American financial services industry. Congressman Patman, called the "godfather of credit unions," 1969 House Debate, at 20887 (remarks of Cong. Annunzio), drew a powerful analogy suggesting the social value of credit unions that has endured since their inception, stating that "next to the church, the credit unions do more good for people than any other institution." 1969 House Debate, at 20884. The cooperative, nonprofit and volunteer features of credit unions that create their distinctive non-economic value are apparent in their collective treatment over time as a "movement." *See, e.g.*, 78 Cong. Rec. 12223 (1934) (remarks of Cong. Steagall, chairman of the House Committee on Banking and Currency); 1969 House Report, at 3 ("Federal credit union movement," referring to its growth as would be fostered by the creation of NCUA).

A major feature of credit unions in this regard was described by the House Committee on Banking and Currency, which declared federal credit unions to be a "socially desirable means of self-help." H.R. Rep. No. 2021, *supra*, at 2 (1934). The FCUA defined a federal credit union as a "cooperative," *id.*, § 2, 48 Stat. 1216, 12

U.S.C. § 1752(1), which continues to be understood today as an enterprise "operated by . . . consumers for their mutual benefit." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY at 321 (rev. ed. 1994). Consumers of financial services have need for the alternative of such collective activity. *See, e.g.*, Washington Post, Oct. 3, 1993, at 8 (Magazine) (founder of credit union comment that "[w]e're losing our sense of taking care of each other. . . . With everyone out for themselves, we've lost sight that cooperation is a higher ethic than competition."). *Cf.* American Banker, Apr. 22, 1997, at 1 (Comptroller of the Currency Ludwig notes, in discussing commercial-bank losses to competitors: "In these turf battles, people lose sight of the consumer.")

A second major characteristic is that federal credit unions are nonprofit organizations. *See* 26 U.S.C. § 501(c)(1). This nonprofit attribute alone is important to credit union customers. *See, e.g.*, N.Y. Times, Sep. 17, 1996, § 3, at 4, col. 1 (subject cites nonprofit status as reason for selection of credit-union membership over competition). Congress early understood that "a credit union must operate for service rather than profit," *A Bill to Provide for the Incorporation of Credit Unions in the District of Columbia, et al.: Hearings on S. 4775, et al., Before the Senate Comm. on the District of Columbia*, 71st Cong., 3d Sess., at 10 (1931) ("1931 Senate Hearings on DC") (statement of postal official Brehm) and that it is a "cooperative society with no outside invested capital." 1932 Senate Hearings on DC, at 51 (article by movement leader Bergengren). That credit unions still perform in accordance with this credo is reflected by the fact that they unvaryingly prevail over banks in the annual customer-satisfaction surveys conducted by the American Banker among bank customers and credit-union members. *See*, American Banker/Gallup Consumer Surveys (1984-95).

A third exceptional feature of these organizations is the extensive voluntarism that marks the credit-union com-

munity. The House Committee on Banking and Currency paid "tribute to the thousands of volunteer workers throughout the country who have formed credit unions and the millions of volunteers who operate these credit unions." 1969 House Report, at 3. See also the remark of Congressman Patman that these volunteers have "devoted . . . their lives to serving credit unions." 1969 House Debate, at 20885. It has been estimated that the value of volunteer time devoted to all credit unions annually is over one billion dollars. *See* 3 Federal Deposit Insurance Corp., BANKING REVIEW, at 25 (1990).

The importance of voluntarism has deep roots in our society. As Alexis de Tocqueville wrote, in democratic nations "none . . . is in a position to force his fellows to help him. They would all therefore find themselves helpless if they do not learn to help each other voluntarily." Tocqueville, 2 DEMOCRACY IN AMERICA Pt. II, c. 5, at 514 (P. Mayer ed., 1969). Voluntary associations of the sort Tocqueville found so important to the United States, and which are echoed in the makeup of federal credit unions, are in decline in contemporary times. *See generally* R. Putnam, "The Strange Disappearance of Civic America," 24 THE AMERICAN PROSPECT 34 (1996), in which the author asks his now famous question: "Why are more Americans bowling alone?" *Id.*, at 36. Recognition of this civic crisis has recently emerged in the Presidents' summit in Philadelphia, where Tocqueville's emphasis on the American habit of voluntarism was invoked by the leadership. N.Y. Times, Apr. 30, 1997, at A16, col. 1.

The loss of credit-union opportunities that would directly result from an affirmance in this case would include the advantages that credit unions offer to the society in the foregoing intangible respects, which can be difficult to quantify but which have demonstrably positive consequences. In an analysis of whether to choose membership in a credit union based on such intangibles, it was acknowledged that to do so "may not make sense to folks

with a bottom-line mentality, but it is part of credit unions' real appeal. Members enjoy a kind of emotional gain in belonging to a credit union." Your Money, June/July 1996, at 36 (Consumers Digest, Inc., pub.). The gain goes beyond credit-union members. *See generally* "The Influence of Democracy on the Sentiments of the Americans," Tocqueville, Part II, *supra*.

The more traditional category of advantages offered by federal credit unions is economic in nature, although even here, federal credit unions exhibit the exceptional attribute of seeking to address the needs of underserved populations. The most well-known economic advantage of credit unions is with respect to the more favorable rates, yields and fees they offer to their members, as compared to those offered by banks. As an example, a "comparison of average deals offered by credit unions and banks revealed that credit unions charge 11% to 24% less for car loans and credit cards and unsecured personal loans and pay one-half to one percentage point higher yields on deposits." Wall Street Journal, June 4, 1996, § C, at 23, col. 2 (reporting on study by "independent newsletter" Bank Rate Monitor). Similar advantages are maintained by credit unions with respect to fees for products such as checking and ATM use. *See, e.g.*, Journal Newspapers, Inc. (Fairfax, Va.), June 4, 1996, at T10 (reporting on Credit Union Fees Survey Report).

More broadly, the favorable position of credit unions in these matters has a beneficial restraining effect on comparable financial products offered by banks as they seek to meet the competition, thus benefiting bank customers indirectly as well as credit-union members directly. In commenting on the sometimes sharp competitive differences between credit unions and banks, the Cleary Professor of Finance at Boston College's Carroll School of Management (Edward Kane) noted that (particularly larger) credit unions "threaten not so much market share but pricing." USBanker, Nov. 1996, at 54. In providing

choice and competition, credit unions "bid down the margins" so banks can't charge higher prices in near-monoply markets. *Id.* at 58. *Cf.* American Banker, Apr. 1997, *supra*, at 1 (Comptroller Ludwig's affirmation that allowing various types of financial institutions to become more competitive is a winning proposition for all participants).

Those in need of the advantages offered by credit unions can be perceived in two ways. In general terms, the Senate Committee on Banking and Currency used the phrase "masses of the people," S. Rep. No. 555, *supra*, at 2; similarly, the House Committee on Banking and Currency used the term "wage workers." H.R. Rep. No. 2021, *supra*, at 2 (1934). One example of service to such rank-and-file employees occurred with respect to the shutdown of the federal government in 1996. "Among the best deals for strapped workers appear to be those offered by credit unions, many of which are granting low-interest or no-interest loans for furloughed members. Some are allowing members to withdraw certificates of deposit without penalty." Washington Post, Jan. 5, 1996, at D1, col. 1.

Moreover, in its preamble referring to those of "small means," the FCUA is given a more expansive reading. 48 Stat. 1216 (1934); 12 U.S.C. § 1751. The concept was raised during consideration of the DC Act of helping people who were "down to bedrock." 1931 Senate Hearings on DC, at 14 (statement of labor union representative Sartwell), and Professor Kane has noted that credit unions do a superior job of servicing underserved communities. USBanker, Nov. 1996, *supra*, at 58. The credit-union movement has acted responsibly to address the needs of this distinguishably disadvantaged segment of the country's population.

Poor and working-class neighborhoods have been particularly affected over the last decade as a result of consolidation in the banking industry, when bank branches have closed steadily, resulting in the growth of credit

unions as the most promising development. N.Y. Times, Sep. 11, 1995, at A1, col. 4. Moreover, large industrial employers, the traditional membership base for credit unions, are shrinking, not expanding, causing credit unions to reach out to underserved groups as one means to continue to grow. *See, e.g.*, St. Petersburg (FL) Times, Sep. 24, 1995, at 1H, 8H. In these inner-city areas, community-development credit unions have "mushroomed around the country," moving from approximately 100 five or six years ago to more than 300 today. USBanker, *supra*, at 59. And in other areas such as the Rio Grand Valley in Texas, it has been reported that credit unions are the "last and only resort for many of the poor who want to own their own homes." Wall Street Journal, Nov. 22, 1995, at T1. If all other sources of reasonable credit have abandoned the field, federal credit unions should be encouraged to expand into the resultant void, not inhibited by a cramped reading of the FCUA's fundamental purpose.

CONCLUSION

The advantages of federal credit unions to financial-services consumers, whether the benefits are intangible or economic, whether the consumers are members or potential members of credit unions or not, and whether the members are average workers or people of small means, are substantial. These are the benefits that underlay the Congressional determination to provide federal charters for credit unions to make their services more available in the FCUA, and to contemplate their growth in the creation of the NCUA. The advancement of the credit-union community fostered by NCUA's interpretation of the common-bond requirement is faithful to the legislation's emphasis on considering economic conditions to ensure federal credit unions' success, essential to some credit union members and important to all the nation's consumers.

For the foregoing reasons, we respectfully urge the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1996

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Petitioner,

and

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CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS (NASCUS) IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS (NASCUS) IN SUPPORT OF PETITIONERS[1]

INTEREST OF AMICUS[2]

The National Association of State Credit Union Supervisors (NASCUS) is a professional association incorpo-

[1] Pursuant to Rule 37.6 of this Court, *amicus* certifies that no counsel for any party to this case authored this brief in whole or in part, and that no one outside the membership of NASCUS made a monetary contribution to the brief's preparation or submission.

[2] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clark of the Court.

rated under the laws of the District of Columbia as a non-profit corporation. NASCUS consists of the 47 state agencies that supervise credit unions in their states and the credit union supervisor for Puerto Rico.[2] Together, they supervise more than 40% of all U.S. credit unions. In addition, to assist in achieving its purposes, NASCUS has created several subsidiary groups: the NASCUS Credit Union Council, the NASCUS Foundation for the Preservation of Dual Chartering, and the National Institute for State Credit Union Examination.

The stated purposes of NASCUS are: (1) to provide appropriate communication between public officials supervising credit unions; (2) to strengthen the supervision of state-chartered credit unions; (3) to collect statistical information concerning credit unions in each state; and (4) to coordinate the policymaking efforts of individual states with respect to the formation and supervision of credit unions.

When the Federal Credit Union Act ("FCUA" or "Act") was enacted in 1934, 38 states already had vibrant and expanding credit union systems. The Act thus created an environment permitting regulatory competition, commonly known as the "dual chartering system," that provides individual credit unions with a regulatory choice, allowing experimentation among the states and between the states and the federal system. The experience of NASCUS' members within this dual chartering environment should inform the Court's interpretation of the Act.[4]

Although the FCUA does not apply directly to state-chartered credit unions, the construction placed on the

[2] The remaining states—Wyoming, South Dakota, and Delaware—do not permit state-chartered credit unions.

[4] NASCUS does not address the first issue to be determined by this Court, *i.e.*, whether banks are "suitable challengers" to the NCUA's interpretation of Section 109 of the Act.

Act by the United States Court of Appeals for the District of Columbia[5] could harm the state credit union system, as well as the federal system, by leading to a significant increase in charter conversions, undermining the dual chartering system, and threatening continued credit union viability. NASCUS has a strong interest in avoiding the adverse consequences arising from the Court of Appeals' decision.

SUMMARY OF ARGUMENT

The Court of Appeals held that the "common bond" provision of the FCUA, contained in Section 109 of the Act,[6] requires all members of a federally-chartered credit union to share a single common bond. *First Nat'l Bank & Trust Co. v. NCUA*, 90 F.3d 525 (D.C. Cir. 1996). The appeals court was apparently concerned that allowing multiple groups, each with a "common bond," to combine within a single credit union would harm its financial soundness. 90 F.3d at 529-30.

But state regulators know from their experience that the ability to have multiple common bond groups *strengthens* rather than reduces the financial soundness and stability of credit unions. Under a variety of state credit union statutes—many resembling the FCUA—state credit union regulators have long permitted multiple common bond group membership without ill effects. A few years before NCUA adopted the policy at issue here, an NCUA study found that 19 state credit union systems had common bond policies that were either "less restrictive" than NCUA policies or "very liberal."[7] Currently, 3 of

[5] A divided panel of the United States Court of Appeals for the Sixth Circuit recently adopted the reasoning of the D.C. Circuit. *First City Bank v. NCUA*, No. 95-6543, 1997 U.S. App. LEXIS 6753 (6th Cir. Apr. 14, 1997).

[6] 12 U.S.C. § 1759.

[7] NATIONAL CREDIT UNION ADMINISTRATION, *Studies In Federal Chartering Policy* 30 (1979) ("NCUA STUDY"). Although this

the 5 states with common bond language identical to the Act permit multiple common bonds.[8]

Credit unions—and common bond requirements—originated in the states, and state statutes provided the structure for the Act. In enacting the FCUA, however, Congress not only sought to make credit union membership widely available, but also to *broaden* those benefits beyond those offered by some states. The multiple common bond policy makes credit union membership available to many people who would otherwise be unable to join, and thus is fully consistent with that purpose. The Court of Appeals' decision would frustrate Congress' intent, however, by imposing an unreasonable restriction on credit union membership.

By creating a parallel chartering system, Congress ensured that credit unions existing in states with restrictive credit union policies would have the option of converting to a federal charter. This system of "regulatory competition" has provided credit unions with the ability to re-charter if one regulatory system or another fails to address adequately the needs of credit unions and their members. Both the state and federal systems have benefited from this productive regulatory competition, which has allowed a healthy diversity of regulatory innovations to flourish. Many significant advances in services to credit union members have begun in the states, including checking accounts, certificates of deposit, long-term mortgages, and credit cards. As the states have permitted credit unions to offer these services, the federal system has followed. The Court of Appeals' approach, however, is such a significant departure from accepted credit union organiza-

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report was drafted by a party to this dispute, it was cited by the trial court because "it predates by three years the interpretive change at issue in this case." *First Nat'l Bank & Trust Co. v. NCUA*, 868 F. Supp. 9, 12 n.11 (D.D.C. 1994).

[8] The three states of the five permitting multiple common bonds are Oklahoma, Tennessee, and Idaho.

tional practice that its effect would make a federal charter clearly unacceptable to many institutions. For many credit unions the single common bond concept would make the federal regulatory system so inherently undesirable that any semblance of "competition" will vanish.

The decision below has already begun to lead to a dramatic and unanticipated increase in charter conversions, as credit unions flee the newly-imposed restriction on federal system membership. Many more federal credit unions have applied to convert to state charters in the months since the appellate court decision than have done so in the last decade, even though that decision has effectively been stayed.[9] Should the Court embrace the Court of Appeals' decision, it would likely cause a stampede from federal to state charters.

While NASCUS members normally would not object to a healthy increase in the number of state-chartered credit unions, affirmance of the decision below would likely have a number of adverse effects:

- a dramatic influx of charter conversion application would unduly burden the operations of state regulators as they investigate credit union conversion applications, forcing them to divert valuable resources from other regulatory functions;
- the dual chartering system that has served credit unions so well would be undermined by these charter conversions, thwarting congressional intent to foster competitive chartering options and implementing bad public policy;
- in states where credit union regulators have adopted policies similar to the NCUA policy at issue here, affirming the lower court decision may

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[9] Between 1985-95, 88 credit unions converted from federal to state charters. Since the Court of Appeals' ruling, a NASCUS survey reports that 87 federal credit unions have substantially completed conversion to state charters.

create similar litigation and uncertainty at the state level;

- some federal credit unions would experience serious problems because state charter conversion would not be an economically viable option. Liquidation or insolvency could threaten federal credit unions with multiple common bonds and with significant operations based in states that either (1) do not authorize out-of-state branches; (2) do not permit multiple common bonds; or (3) have no state credit union law at all. This could strain the National Credit Union Share Insurance Fund (NCUSIF), which insures the shares and deposits of most state chartered credit unions.

NASCUS therefore submits that the decision below is contrary to the language and purpose of the Act and should be reversed. The decision contradicts the established policies of the majority of states that have permitted multiple common bond groups. There is no sound policy reason for overturning NCUA's judgment that it is unnecessary and unwise to require each credit union to have a single "common bond."

ARGUMENT

I. THE NATIONAL CREDIT UNION ADMINISTRATION'S INTERPRETATION OF THE FEDERAL CREDIT UNION ACT IS CONSISTENT WITH THE ACT'S PURPOSES.

This dispute centers on whether the phrase "groups having a common bond," as used in Section 109 of the Act, is singular or plural, *i.e.*, one group or many. This phrase is not defined or otherwise explained in the Act itself. Thus, in this instance, the Court should defer to NCUA's interpretation of the statute as long as that interpretation is reasonable. *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984).

A well-developed state credit union system formed the backdrop for Congress' consideration and enactment of the FCUA. By creating a federal credit union system through the Act, Congress sought to make the benefits of credit union membership available to most Americans. *See* pp. 9-11, *infra*. But those benefits did not remain frozen as they existed in 1934. Over decades, a large majority of states adopted multiple common bond policies to permit greater access to credit unions and to strengthen those credit unions. In adopting its own multiple common bond policy, NCUA acted to achieve those same goals. As this Court stated in *Chevron*, "[a]n initial agency interpretation is not instantly carved in stone." *Id.* at 864. "An agency is not required to 'establish rules of conduct to last forever,' . . . but rather must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)).

Because of the link between the state and federal systems, the state regulatory experience should inform this Court's assessment of Section 109. As the Court has stated, in determining the meaning of any statute, this Court looks "not only to the particular statutory language, but to the design of the statute as a whole and its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "The meaning of statutory language, plain or not, depends on context.'" *Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (quoting *Brown v. Gardner*, 115 S. Ct. 552, 555 (1994)).[10]

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[10] Legislative history "can be a legitimate guide to a statutory purpose obscured by ambiguity," *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987); moreover, even if statutory language is "superficially clear, legislative history may call such apparent clarity into question." *Tataranowicz v. Sullivan*, 959 F.2d 268, 277 (D.C. Cir. 1992).

A. Congress Intended The FCUA To Broaden Participation In Credit Unions By Permitting Flexible Regulation That Built And Expanded Upon State Regulatory Authority.

1. *State Credit Union Policy Laid The Groundwork For the FCUA.*

The American system of credit unions traces its origins to the cooperative banks and building and loan associations of New England in the early 1900s, and before that to the credit cooperatives of mid-19th century Germany.[11] Credit unions arose in response to the need of working and middle-class Americans for credit on reasonable terms.[12] By 1934, thirty-eight states had credit union statutes and nearly 3000 credit unions served Americans.[13]

The financial distress of the banking system during the Depression of the 1930s led Congress to encourage alternatives to traditional banking.[14] Congress found the growing credit union movement to be one such alternative, especially in providing consumer credit.[15] In 1932, drawing upon the credit union laws of various states,[16] Congress enacted a credit union statute for the District of Columbia.[17] This statute prepared the way for Congress' enactment of the FCUA two years later.[18]

2. *Congress Created The FCUA To Establish A Dual System Of Credit Union Regulation That Would Spur Expanding Services.*

Congress wanted the federal credit union system not only to emulate the state system, but to expand upon its achievements. As noted above, 38 states had credit union stautes when the Act was passed. However, some state credit union statutes imposed onerous taxes or fees that undermined the benefits of credit union membership.[19] Congress saw the FCUA as a means to bring credit unions to the ten states without credit union laws, to provide more appropriate laws than existed in some states, and to create a federal system to make credit union service available across the country.[20]

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[11] *La Caisse Populaire Ste. Marie v. United States*, 425 F. Supp. 512, 518-20 (D.N.H. 1976), *aff'd*, 563 F.2d 505 (1st Cir. 1977). *See generally* J. CARROLL MOODY AND GILBERT C. FITE, THE CREDIT UNION MOVEMENT, ORIGINS AND DEVELOPMENT 1850-1980 (2d ed. 1984).

[12] The primary distinction between credit unions and other financial institutions is not the "field of membership" restriction, but a more basic difference, as described by the First Circuit in *La Caisse Populaire Ste. Marie*, 563 F.2d at 509:

> A credit union is a democratically controlled, cooperative, nonprofit society organized for the purpose of encouraging thrift and self-reliance among its members by creating a source of credit at a fair and reasonable rate of interest in order to improve the economic and social conditions of its members. A credit union is fundamentally distinguishable from other financial institutions in that customers may exercise effective control.

[13] S. REP. No. 555, 73d Cong., 2d Sess. ("SEN. REP.") 2 (1934).

[14] As the Court of Appeals conceded, the Act was not "intended to shield banks from competition." 90 F.3d at 529. It is apparent, however, that the banks have instituted this litigation because of competitive concerns, rather than from some amorphous public interest goal or desire to preserve the financial stability of credit unions.

[15] SEN. REP. at 1-4; H.R. REP. No. 2021, 73d Cong., 2d Sess. ("HOUSE REP.") 1-2 (1934).

[16] J. CARROLL MOODY AND GILBERT C. FITE, *supra*, at 98-99.

[17] 47 Stat. 326 (1932), *repealed by* Pub. L. 88-395, 78 Stat. 377 (1964). In 1964, the district's credit unions became subject to the FCUA. 12 U.S.C. § 1773.

[18] J. CARROLL MOODY AND GILBERT C. FITE, *supra*, at 98-99. Both the initial bill in the Senate and the final legislation as enacted by Congress drew heavily from the District of Columbia statute, which contained language that was itself borrowed from state credit union laws. SENATE REP. at 1-2.

[19] SEN. REP. at 4; HOUSE REP. at 2.

[20] HOUSE REP. at 2.

The Senate Banking and Currency Committee listed a variety of reasons for creating a federal credit union system, including:

> (c) In order to have a uniform development, the State laws differ in essential particulars and many of them are very imperfect, rendering normal development impossible.
>
> (d) In order to make credit union organization possible everywhere in the United States, 10 States at the present time have no credit union laws at all.
>
> (e) To escape overburdensome State taxation in some States and excessive organization fees in other States.
>
> —SEN. REP. at 4.

This view was echoed by the House Banking and Currency Committee:

> There are 10 States which have no credit union laws and by a single enactment the residents of those States would obtain the benefits of credit union organization. The committee is informed that in many of the States which have credit union acts, the inadequacy of the law or the lack of interest on the part of the State banking department tends to restrict proper credit development; also there are cases in which communities and organizations cross State lines and in these cases a useful sphere for Federal credit unions would seem to be presented.
>
> —HOUSE REP. at 2.

A principal purpose of the FCUA was thus to allow credit unions to avoid restrictive aspects of the existing state systems that were limiting credit union membership. Moreover, should federal regulators fail to adapt their regulations to evolving conditions, the FCUA allows credit unions to seek a more enlightened model among the states.[21] And since states also permit their credit

[21] 12 U.S.C. § 1771.

unions to convert to *federal* charters, passage of the Act created a system of "competitive regulation" that spurred further expansion of the pool of credit union customers and services within a sound regulatory regime.[22]

3. *The Multiple Common Bond Policy Is Consistent With Congress' Goal Of Broad Availability Of Credit Union Services.*

Multiple common bond membership is consistent with Congress' intent in passing the Act because it permits many Americans to join credit unions who would otherwise be unable to enjoy the benefits of credit union membership. NCUA adopted the multiple common bond policy to expand those benefits to the growing numbers of people employed in small, service-oriented, businesses.[23] Moreover, by opening existing credit unions to employees of these companies, NCUA not only increased the number of people receiving the benefit of credit union membership, but stabilized the financial health of the credit unions themselves.[24] As then-NCUA Chairman Edgar F. Callahan stated, the multiple group policy enabled credit unions to "take their eggs out of one basket so the credit

[22] The dual chartering system created by the FCUA has eliminated any "lack of interest" in credit unions among current state regulators, such as concerned the House Banking and Currency Committee in 1934. The very existence of NASCUS and the NASCUS Foundation for the Preservation of Dual Chartering evidences the success of Congress' creation of regulation competition.

[23] NATIONAL CREDIT UNION ADMINISTRATION, *1983 Annual Report* ("NCUA 1983 Annual Report") at 4 (explaining multiple common bond policy was an attempt to promote credit union survival despite layoffs and plant closings by large-scale employers by tapping into the boom in small and medium-sized business employment). *See also* Statement of Norman E. D'Amours, Chairman, National Credit Union Administration, *Issues Facing the Credit Union Industry: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services*, 105th Cong., 1st Sess. (1997).

[24] NCUA 1983 Annual Report at 4-5.

union won't rise or fall with its sponsoring organization."[25] By increasing the chances of survival of credit unions with failed sponsors, the safety and soundness of the entire credit union system was enhanced.

The Court of Appeals decision, if affirmed, would have exactly the opposite effect. If credit unions are forced to shed members who lack a single common bond, those organizations will become less financially secure. Moreover, according to a recent University of Wisconsin study, nearly 63 million workers—most earning below average wages and lacking health and pension benefits—will be unable to join federal credit unions if the lower court's decision is sustained.[26] These results are completely inconsistent with Congress' intent in enacting the FCUA.

The Court of Appeals' decision subjects the federal system to a restriction that will significantly limit participation in credit unions. As a result, the federal credit union system may well be so undermined that it will no longer present a competitive check. Thus, the dual system of regulation would be essentially destroyed. NASCUS submits that such a result turns the Act on its head.

B. State Credit Union Regulators Have Widely Permitted Multiple Common Bond Membership Without Ill Effects.

At the time NCUA adopted the multiple common bond policy, a significant number of states already permitted multiple common bond membership. By adopting this policy, NCUA was simply following the regulatory lead of the states.

In 1979, three years before NCUA announced its new rule, 19 states reported having field of membership poli-

[25] *Id.* at 5.

[26] STEPHEN WOODBURY, DAVID SMITH, & WILLIAM KELLY, FILENE RESEARCH INSTITUTE AND THE CENTER FOR CREDIT UNION RESEARCH, UNIVERSITY OF WISCONSIN-MADISON, AN ANALYSIS OF PUBLIC POLICY ON CREDIT UNION SELECT EMPLOYEE GROUPS 3-4 (1997).

cies that were more liberal than the existing federal policy.[27] NCUA reported that in that same year 21.6% of all credit unions—federal and state—served more than one employee group.[28] By 1983, this percentage had increased to 36%.[29] NCUA acknowledged the leadership role played by the states in its 1983 Annual Report:

> In many cases, states began to adjust credit union membership policies to the changing workplace long before the Federal government did. States continued to provide even more flexibility in 1983 in chartering and field of membership policies, according to a recent survey by the National Association of State Credit Union Supervisors.[30]

Indeed, the 1983 NCUA report quotes Oklahoma's Bank Commissioner as stating that "recent Federal field of membership policy changes have done little more than catch up to the field of membership policies as determined by the Oklahoma Credit Union Board."[31]

One state that preceded NCUA in permitting multiple common bonds is Michigan, whose credit union statute opens credit union membership to "groups, of both large and small membership, having a common bond of occupation or association . . . ." MICH. COMP. LAWS 490.5 (1997). The Michigan Court of Appeals found that this statute "permits a single credit union to have a field of membership consisting of employees of more than one group as long as the composition of each group is based on a single criterion." *Casazza v. Michigan Dept. of*

[27] NCUA STUDY at 30 (citing Credit Union National Association study).

[28] NCUA 1983 Annual Report at 10 (citing 1979 data).

[29] *Id.*

[30] *Id.* at 9.

[31] *Id.*

Commerce, 350 N.W.2d 855, 862 (Mich. Ct. App. 1984).[82]

The court found that Michigan's credit union statute was not designed to "curtail possible competion by the credit unions with the banking and savings and loans institutions. We view the intent of the Michigan credit union statute to be to encourage growth of credit unions and increases in membership." *Id.* at 857. The court concluded:

> We agree that in establishing permissible fields of membership, economic viability must be considered. This simply means that while 50 or 60 years ago a very small group may have been capable of supporting a successful credit union, under today's economic circumstances that is no longer possible, but a collection of several small groups could provide enough members to make a viable credit union.[83]

The court further noted that any other result could have wide-ranging adverse consequences on credit unions and their ability to serve their members.[84]

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[82] The relevant language of the Michigan statute has not changed since the *Casazza* decision. Although the opinion was rendered in 1984, the policy was announced in 1980 and confirmed by the agency in 1981, well before NCUA adopted its multiple common bond policy. 350 N.W.2d at 858. The court also observed that Michigan's credit union regulator, upon recommending the multiple common bond policy in 1981, noted that there were already at least 11 Michigan credit unions with similar membership criteria. *Id.*

[83] *Id.* at 860.

[84] *Id.* North Carolina regulators also attempted to open up credit union membership to multiple common bond groups, but the North Carolina Supreme Court (reversing a unanimous appeals court decision) refused to permit this. *North Carolina Savings & Loan League v. North Carolina Credit Union Comm'n*, 276 S.E.2d 404 (N.C. 1981). Unlike the FCUA and the Michigan statute, however, the North Carolina law limits membership to persons with "the common bond." N.C. CODE § 54-109.26(a). The North Carolina court held this language imposed an "obvious" requirement that there be "one and the same common bond" between all members of a credit union. 276 S.E.2d at 411. No similar language appears in Section 109.

Moreover, the North Carolina result was criticized by both the Michigan court and by two dissenting North Carolina Supreme Court justices who noted:

> The really sad aspect of the majority's opinion is that thousands of local government employees who are not eligible for credit at private for-profit financial institutions simply cannot obtain the credit needed "to improve their economic and social conditions." The statute entitles them to membership in the State Employees' Credit Union where such credit would be available. The majority erroneously denies them this privilege.
>
> —*Id.* at 416-17.

For many of same reasons cited by the Michigan court, multiple common bond policies have been adopted in a wide variety of jurisdictions—from states like Oklahoma and Tennessee whose credit union statutes resemble the FCUA,[85] to states like New York and California that provide broad agency discretion over field of membership issues.[86]

The states have authorized multiple common bonds for the same reasons cited by NCUA in adopting the policy in dispute here.[87] As both the Court of Appeals and the

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[85] OKLA. STAT. § 6-2007 (1997) ("limited to groups having a common bond . . . ."); TENN. CODE ANN. § 45-4-301 (1997) ("limited to groups having a common bond . . . .").

[86] CAL. FIN. CODE § 14155 (1997) (state regulator may deny change in field of membership only in limited circumstances); N.Y. BANKING LAW § 451 (1997) (credit union "membership shall be limited to persons having one, or with the approval of the superintendent, which approval shall not be given if it would be destructive of competition [among credit unions] within a municipality, more than one common employer . . . .").

[87] Statement of David L. Paul, Chairman, National Association of State Credit Union Supervisors, Commissioner, Division of Financial Services, State of Colorado, *Issues Facing the Credit Union Industry: Hearing Before the Subcommittee on Financial Institutions and Consumer Credit of the House Committee on Banking and Financial Services* (hereafter "Paul Testimony"), 105th Cong., 1st Sess. (1997).

District Court acknowledged, the multiple common bond policy allows credit unions to benefit from economies of scale and to diversify membership to stay strong even if one group of members encounters financial difficulty. 90 F.3d at 526; 863 F. Supp. at 13. It also permits groups that are too small to form their own credit union to join a preexisting one. 90 F.3d at 527. As such, it is fully consistent with the Act's purpose.

In assessing Section 109 of the Act, the Court of Appeals expressed a fear that credit unions with multiple common bond membership might not be able to "loan on character," suggesting this could harm credit unions in some way. 90 F.3d at 529-30. The appeals court offered no support for its speculation that this harm would result. NASCUS submits that it is not aware of any experience in the many states that now permit multiple common bonds that would lend credence to the appeals court's speculation. Indeed, reversing the trend of failures among single common bond credit unions was a primary reason why the multiple common bond policy was adopted in the first place.[38]

As NASCUS Chairman David L. Paul recently testified to Congress:

> Just as farmers have warned us about putting all our eggs in one basket, regulators have come to understand that there is generally value in mixing employers in the field of membership of credit unions. Diverse employers help ensure the economic viability of credit unions—an observation which probably prompted the NCUA to approve small employer groups for federal credit unions during the economic downturns of the early 1980s.[39]

The appeals court also seemed concerned that some credit unions had grown quite large under the multiple

[38] NCUA 1983 Annual Report at 5.

[39] Paul Testimony.

common bond policy. 90 F.3d at 530. This alone cannot be a valid concern; numerous single employers in today's economy have tens of thousands of employees, and some well over 100,000. For example, the State Employees Credit Union in North Carolina had nearly 600,000 members as of March 1996.[40] Yet under any view of the statute, all of these persons properly belong to a single credit union.

II. A FEDERAL RESTRICTION ON MULTIPLE COMMON BONDS WOULD ADVERSELY AFFECT THE DUAL CHARTERING SYSTEM.

A. The Court Of Appeals Decision Has Already Led To Substantial Charter Conversion Activity.

Credit unions may be chartered under either state or federal law and may recharter if either system of regulation becomes unreasonably restrictive. 12 U.S.C. § 1771. Of course, Congress did not contemplate misguided and extreme limitations that would lead to wholesale conversions from the federal system. The Court of Appeals' decision imposes economically irrational restrictions on federal credit unions that do not exist for most of their state counterparts, thereby creating the potential for a large number of federally-chartered credit unions seeking conversions to state regulation. This influx threatens to divert scarce state regulatory resources from other important areas of responsibility to rechartering issues.

A survey of NASCUS members taken immediately after the Court of Appeals' decision reported that approximately 200 federally chartered credit unions had recently contacted their state regulatory agency to inquire about the conversion process in their state.[41] Since the Court of

[40] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, FACTS AND FIGURES ON STATE CHARTERED CREDIT UNIONS ("NASCUS Facts and Figures") 4 (March 1996).

[41] Paul Testimony. *See also* Bill McConnell, *Federal Credit Unions Eye Shift To More Liberal State Charters*, THE AMERICAN BANKER, February 27, 1977 at 2; NATIONAL ASSOCIATION OF STATE

Appeals' decision, state regulators have received 96 formal requests by federally chartered credit unions to approve their conversion to a state charter, and 87 credit unions have substantially completed conversion to state charters.[43] This figure is nearly three times the total number of charter conversion requests for the past decade,[45] and constitutes nearly 1.5% of the total number of federal credit unions as of the date of the appeals court's decision. Charter conversion is occurring in states across the country, including Colorado, Florida, Illinois, New Hampshire, Ohio, Texas, and Washington state.[44]

If the lower court's decision is not reversed, a large number of charter conversion applications from federal credit unions to state regulators will place an unfair and unnecessary burden on the states. The application review process can be time-consuming. The conversion process generally requires careful analysis of the credit union's financial standing. Appropriate conversion procedures

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CREDIT UNION SUPERVISORS AND THE CREDIT UNION NATIONAL ASSOCIATION, INC., 1997-98 PROFILE OF STATE CREDIT UNION SUPERVISORY AGENCIES (hereafter "1997-98 NASCUS Profile") at 224.

[42] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, *Membership Survey* (April 1, 1997). Indeed, Respondents appear to recognize that this is occurring. *See* Brief of Respondents First National Bank and Trust Co. *et al.* in Opposition to Petition for Certiorari at 18 n.20 ("Federal credit unions operating in states that do not impose a common bond requirement for state-chartered credit unions may convert their charters . . . and, if press reports are accurate, many have already taken steps toward doing so.").

[43] CREDIT UNION NATIONAL ASSOCIATION, DEPARTMENT OF ECONOMICS AND STATISTICS, *CU Changes From Federal To State Charter* (April 22, 1997).

[44] According to a recent article, since July 1996, 134 federal credit unions have asked NCUA for permission to switch from an occupational or associational charter to a community charter, while 66 have notified NCUA of their intention to convert to state charters. Dean Anason, *Credit Unions Eye Charter Flips To Evade Court Ruling*, THE AMERICAN BANKER, March 24, 1997 at 2.

can, thus, take months.[46] Several states even require hearings for charter applications.[47] The burdens involved in these processes must be borne by state regulators and all state-chartered credit unions. In the end, credit union members will lose.[47]

B. Undermining The Dual Chartering System Is Bad Public Policy.

The first fatalities of the influx of federal to state charter conversions will be the dual chartering system and healthy regulatory competition. If the federal system is so weakened that it is no longer a viable option for large credit unions, the healthy regulatory competition that has spurred credit union development will disappear. A weakening of the dual chartering system creates the potential for decreasing services and fewer credit unions at both the state and federal levels.

Since credit unions have the ability to "vote with their feet" and convert between a state or federal charter as needed, federal and state regulators must be responsive to the appropriate competitive needs of credit unions and their members. Competitive regulation is explicitly acknowledged in Montana's credit union statute, which authorizes state-chartered credit unions to engage in the same activities as their federal counterparts, if the state regulator approves. Montana's statute requires the state regulator to permit such activities "if he finds that it fosters competitive equality between state and federal

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[45] NATIONAL ASSOCIATION OF STATE CREDIT UNION SUPERVISORS, CHARTER CONVERSION GUIDE—FEDERAL TO STATE (1996).

[46] 1997-98 NASCUS Profile at 167.

[47] Charter conversion imposes substantial costs on the converting credit union as well. For example, the Nevada Federal Credit Union in Las Vegas is changing to a state charter. Its president states that it will require "significant paperwork" and cost "several hundred thousand dollars" to accomplish the charter conversion and related tasks. Dean Anason, *supra*, at 2.

credit unions and prevents adverse effects on members of state-chartered credit unions."[48] Similarly, the Arkansas legislature amended its credit union statute in 1979 to respond to what it deemed "an unfair competitive advantage" held by federal credit unions over their Arkansas-chartered counterparts.[49]

By the same token, for many state credit unions, conversion to a federal charter will no longer be a practical alternative in the event that state regulations become too restrictive. For example, multi-state credit unions must be able to serve their members, regardless of location. At present, the Act allows for the creation of multi-state multiple common bond institutions even in states that do not permit out-of-state-chartered credit unions. A number of states restrict or prohibit operations by credit unions chartered in other states. The interstate capacity of federal credit unions fulfills one of the purposes stated by Congress enacting the Act in the first place.[50] If the Court upholds the lower court's decision, however, multi-state multiple common bond institutions will be, at the very least, threatened with restrictions.

If this Court affirms the decision below, states in which credit union regulators have adopted policies similar to the NCUA policy at issue here may face similar challenges to their own multiple common bond policies. If those policies are struck down, state credit unions may be weakened and begin to fail, asserting claims against the NCUSIF, which insures 86% of state credit unions.[51] Such a drain on the Fund, coupled with that from failing

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[48] MONT. CODE ANN. § 32-3-206 (1997).

[49] ARK. STAT. ANN. § 23-35-401 note (quoting "emergency clause") (1997).

[50] HOUSE REP. at 2 ("there are cases in which communities and organizations cross State lines and in these cases a useful sphere for Federal credit unions would seem to be presented").

[51] NASCUS Facts and Figures at 3.

federal credit unions, weakens the solvency of the Fund and threatens services to members.

Credit unions have succeeded in large part because a healthy dual system of federal and state credit unions has spurred each system to improve. Weakening the federal system through unnecessary and ill-advised restrictions will harm not only the federal system, but also threatens grave harm to the parallel state system, and to the competitive vibrancy of the dual chartering system itself.

CONCLUSION

For the reasons stated above, NASCUS respectfully submits that the judgment should be reversed.

Respectfully submitted,

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October Term, 1996

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

and

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The National Association of Federal Credit Unions ("NAFCU") is a non-profit association whose members comprise approximately one thousand federal credit unions located throughout the United States. The members of NAFCU, and the more than 23.9 million member-owners of these credit unions, are adversely affected by the decision below. NAFCU submits this Brief to emphasize the critical significance of this case to the future of the credit union community and to present additional legal reasons why the decision of the court of appeals should be reversed. This Brief is filed with the consents of all parties, which are on file with the Clerk.

NAFCU member credit unions serve 54.9% of all federal credit union members and have $111.5 billion in shares outstanding. NAFCU represents the interests of these credit unions and their members on issues pending in Congress, executive agencies and the courts. A majority of the credit unions represented by NAFCU have been authorized to expand their field of membership pursuant to the multiple occupational group policy of the National Credit Union Administration ("NCUA") which is the focus of this litigation.

SUMMARY OF ARGUMENT

This case involves the legality of the NCUA's application of the "common bond" provision of the Federal

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[*] No counsel for any party had any role in authoring this brief, and no person other than the named *amicus* and its counsel made any monetary contribution to its preparation for submission.

Credit Union Act ("FCUA"), 12 U.S.C. § 1759, in approving requests by federal credit unions to add new employee groups to their field of membership.

I. Banks are not within the zone of interests protected by Section 1759 and therefore lack standing to challenge NCUA's actions. Congress, in adopting the field of membership provision of the FCUA, established a standard to be applied by the regulator in determining whether the proposed credit union would be economically advisable -- that is, whether it could operate safely and soundly. Congress did not intend to protect banks from competition from federal credit unions. Further, the 73rd Congress enacted a number of laws in 1933-34 that restructured the banking industry and subjected surviving banks to an unprecedented degree of federal regulation, in response to concerns that banks had caused and exacerbated the Great Depression. This historical record dispels any notion that the 73rd Congress, in adopting the FCUA, intended to protect banks from competition from infant federal credit unions.

The court of appeals correctly determined that banks were not intended beneficiaries of the FCUA and that Congress was not concerned with their competitive position in enacting the law. These findings should have resulted in dismissal of the case. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517 (1991). The D.C. Circuit, however, allowed the case to proceed under an alternative test, called the "suitable challenger" doctrine, which erroneously focuses on the effects of giving a particular party standing, rather than focusing on Congressional intent as this Court's decisions require. The court of appeals also misread and misapplied prior "competitor standing" cases, by failing to focus on the "particular provision of law upon which the

plaintiff relie[d]" in those cases. *Bennett v. Spear*, 117 S. Ct. 1154 (1997). Properly analyzed, there is a material difference between the explicit statutory barriers to entry involved in those cases and the common bond provision, which serves as an internal standard for the NCUA to apply in determining whether approval of a credit union application would be economically advisable.

II. On the merits, the court of appeals erred by failing to defer to the NCUA's longstanding interpretation of the field of membership provision, in violation of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court below found that the intent of Congress was clearly discernible from the text of Section 1759. However, the meaning of the phrase "common bond" is ambiguous and gives NCUA substantial discretion as to how the field of membership provision should be applied to protect the economic viability of proposed credit unions. This ambiguity is clearly demonstrated by the fact that the banks, in opposing *certiorari*, did not rely on the construction the D.C. Circuit thought was plain on the statute's face. Rather, they relied on a different interpretation, which they also insist is plain, but which the court rejected. Where three competing interpretations of the statue are presented, *Chevron* provides that deference is due the NCUA's construction.

In interpreting the common bond provision, the court of appeals failed to consider the principal clause of Section 1759, which grants the NCUA broad discretion to determine, by rule, the appropriate standards for membership in a credit union and explicitly authorizes the NCUA to include "organizations" of people within the field of membership. The court also failed to examine the operation of the common bond provision in the overall context of the FCUA,

where it serves as an administrative test to make certain that a proposed credit union will be safe and sound, rather than as a barrier to competition. The NCUA has made a reasoned determination that permitting additional employer groups to be added to the field of membership of existing credit unions would promote their safety and soundness, by diversifying risk and permitting institutions to take advantage of scale efficiencies. Its interpretation is entitled to deference.

ARGUMENT

I. BANKS LACK STANDING TO CHALLENGE APPLICATION OF THE FIELD OF MEMBERSHIP PROVISION OF SECTION 1759.

Commercial banks do not fall within the zone of interests protected by Section 1759 and therefore lack standing to challenge NCUA's application of the field of membership provision.

A. The Common Bond Provision Does Not Protect Banks from Competition.

The zone of interests test is a prudential limitation on standing, designed to determine whether a particular plaintiff should be heard to complain of a particular agency decision. It focuses exclusively on Congressional intent in enacting the law, in order to "determine whether [these plaintiffs] were meant to be within the zone of interests protected by those statutes." *Air Courier Conference*, 498 U.S. at 524; *see also Clarke*, 479 U.S. at 399 ("the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute"). Whether the plaintiff falls within the zone of interests "is to be determined not by reference to the overall purpose of the

Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 117 S. Ct. at 1167.

The court of appeals, upon review of the language and legislative history of Section 1759, determined that the common bond requirement was "designed to benefit the members -- particularly potential borrowers -- of credit unions." *First Nat'l Bank and Trust Co. v. NCUA*, 988 F.2d 1272, 1276 (D.C. Cir. 1993). The court determined that "Congress did not, in 1934, intend to shield banks from competition from credit unions." *Id.* at 1275. It found "no indication that Congress was, at that earlier time, concerned about the competitive position of banks." *Id.* at 1276. Its conclusion agrees with that of the Fourth Circuit, which found that "[t]here is no evidence from any source . . . that Congress also intended by [the common bond] provision to protect the competitive interests of banks." *Branch Bank and Trust Co. v. NCUA*, 786 F.2d 621, 626 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987).

This conclusion is correct. It is sufficient, of itself, to warrant reversal of the decision below for lack of standing, under *Air Courier* and *Clarke*.

Credit unions are membership organizations, which operate on a non-profit basis and are self-governed and self-financed by their member/owners. 12 U.S.C. §§ 1757-1761. The members invest their own money in the entity, in the form of membership shares, and elect their own directors on a one person, one vote basis. Unlike commercial banks, credit unions are not open to any member of the public. Only individuals who fall within a specific field of membership approved by the NCUA may apply for membership. In addition, credit unions may make loans only

to people who have been elected to membership and purchased shares. *Id.* at § 1757(5). Thus, definition of an appropriate field of membership is critical to the operation of these mutual self-help organizations. The common bond clause has been part of the field of membership provision since the FCUA was adopted in 1934.

Section 2 of the original FCUA, 48 Stat. 1216, renumbered Section 102, *as amended by* 12 U.S.C. § 1752, defined a federal credit union as:

> a cooperative association organized . . . for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes.

Section 3 required the original incorporators to prepare an organizational certificate, which among other things "shall specifically state . . . the proposed field of membership, specified in detail." 48 Stat. 1217, renumbered Section 103, *as amended by* 12 U.S.C. § 1753(5).

Section 4 of the FCUA further provided that upon receipt of the organizational certificate, the federal regulator must determine: (1) whether the certificate conforms to the FCUA, which necessarily includes the requirement that the proposed field of membership be described in detail; (2) the general character and fitness of the subscribers; and (3) "the *economic advisability* of establishing the proposed Federal credit union." 48 Stat. 1217, renumbered Section 104, *as amended by* 12 U.S.C. § 1754 (emphasis added).

Finally, Section 9 of the FCUA, 48 Stat. 1219, renumbered Section 109, *as amended by* 12 U.S.C. § 1759,

provided that membership in a federal credit union shall consist of:

> the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the [federal regulator], as may be elected to membership and as such shall each, subscribe to at least one share of its stock . . . except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

In the structure of the FCUA, the common bond provision of Section 9 is tied directly to the requirement in Section 3 that the incorporators submit to the regulator "the proposed field of membership, specified in detail"; and to the regulator's determination under Section 4, based on that submission and after investigation, about "the economic advisability of establishing the proposed Federal credit union."

The banks' standing to challenge an NCUA field of membership decision is determined by whether their interest falls within the zone of interests protected by Section 1759, the "specific provision which they allege had been violated." *Bennett v. Spear*, 117 S. Ct. at 1167. The field of membership provision, with its common bond component, serves as an internal test the regulator applies to judge the economic feasibility of a proposed credit union. Nothing in the text of Section 9 as adopted in 1934 or the structure of the FCUA suggests that the field of membership provision was intended to protect banks or restrict the degree of competition federal credit unions could offer banks. Rather,

Section 9 operated exclusively as an administrative standard to ensure the regulator considered and approved the "economic advisability" of the proposed credit union -- that is, its safety and soundness. Accordingly, the banks are not within the zone of interests protected by the field of membership provision.

B. The "Suitable Challenger" Rationale Is Inconsistent with This Court's Prior Zone of Interests Decisions.

Despite its conclusion that banks were not intended beneficiaries of Section 1759, the court of appeals nonetheless found that they satisfied the zone of interests test under the "suitable challenger" rationale. This doctrine, unique to the D.C. Circuit, is inconsistent with this Court's zone of interests decisions, notably *Air Courier* and *Clarke*, and cannot provide a lawful basis for bank standing to challenge NCUA field of membership decisions.

1. The "suitable challenger" rationale is fundamentally flawed, because it transforms the nature of the zone of interests inquiry from a determination of Congressional *intent* into an examination of the practical *effects* of granting standing to a party Congress did not intend to protect. In practice, the D.C. Circuit's inquiry is whether the plaintiff's interests are "congruent with those of the intended beneficiaries," 988 F.2d at 1276, in the sense that the resulting pattern of litigation is likely to resemble closely the litigation that presumably would have been filed by the entities Congress actually intended to protect. This Court's decisions provide no justification for such a results-oriented test.

2. The "suitable challenger" doctrine is essentially contentless. It simply provides a catch phrase for articulating a conclusion that a party *should* be granted prudential standing, rather than providing objective criteria that courts may use to make reasoned and consistent decisions about which parties, out of the universe of potential litigants, Congress actually intended to protect. The lack of judicially manageable criteria is demonstrated by the verbal formulas the D.C. Circuit applies in performing this test: whether the interests of the plaintiff are "sufficiently congruent" with those of the intended beneficiaries; and whether recognizing the plaintiff's standing will lead to a "misdirection of the statutory scheme." 988 F.2d at 1279.

3. The "suitable challenger" test is subject to arbitrary application, depending upon how the reviewing court chooses to characterize the effects of the statute and to define the "interests" ostensibly involved. Here, the court of appeals noted that, in furthering the statutory purposes of assuring the economic viability of a credit union and ensuring that it would meet members' borrowing needs, the common bond provision might serve as a limitation on its growth. 988 F.2d at 1277. The court then reasoned that this effect was "akin to entry restrictions", and that this similarity justified application of competitor standing decisions that involved laws which explicitly prevent one type of enterprise from offering a specific product to a particular group of customers. *Id.* However, the D.C. Circuit mischaracterized Section 1759 as involving an entry restriction, so the whole premise for its argument fails.

Each of the persons covered by a multiple employer group is already eligible to receive financial services from a federal credit union, either from an existing institution or from a credit union that could be newly organized. The field

of membership provision, with its common bond subclause, does not confine different types of financial institutions to separate spheres of activity, nor does it divide potential savers into groups who can be served only by credit unions and those who can be served only by banks. In applying the common bond requirement, the issue before NCUA is whether a particular credit union, out of the universe of those potentially eligible, ought to be authorized to offer its services to a particular group of savers, factoring in safety and soundness considerations. Thus, the court of appeals erred in finding that Section 1759 created an entry barrier or a "picket line" akin to the explicit prohibitions against competition involved in this Court's competitor standing cases.

4. In invoking the competitor standing cases to justify its decision, the court of appeals committed the same mistake this Court warned against in *Bennett v. Spear*. The D.C. Circuit relied on a broad characterization of "the overall purpose of the Act in question", rather than analyzing the Congressional intent underlying "the particular provision of law upon which the plaintiff relie[d]." 117 S. Ct. at 1167.

Each of the decisions the court cited involved an explicit statutory prohibition that prohibited one type of institution -- commercial banks or bank service corporations -- from offering a defined type of financial service to customers.[1/] The D.C. Circuit mischaracterized those

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1/ *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971)(Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, which provided that a national bank "shall not underwrite any issue of securities or stock"); *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 401-02 (Sections 7 and 8 of the Banking Act, 12 U.S.C. §§ 36, 81,

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decisions as finding standing because of "the congruence of plaintiffs' interests with those of the intended beneficiaries." 988 F.2d at 1276-1277 (discussing *Investment Co. Institute* and *Clarke*). However, such a results-oriented "effects test" or discussion of "congruence" is simply not present in those opinions. In each case, the Court actually found that Congress sought to protect the interest of the would-be plaintiff in adopting an anti-competition prohibition.

In sum, the "competitor standing" cases are not applicable here, because Section 1759 does not constitute the kind of explicit statutory barrier required for a would-be competitor to fall within its zone of interests. To the contrary, this case is controlled by *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Commercial banks occupy the same position as the reporting service in the Court's hypothetical -- even if they satisfy the "injured in fact" test, they are not "adversely affected" by NCUA's alleged violation of the common bond provision, within the meaning of the zone of interests test. 497 U.S. at 883; *accord Air Courier*, 498 U.S. at 524.

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which limited "the general business" of a national bank to its headquarters and any "branches" permitted under Section 36); *accord Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)(Section 4 of the Bank Service Corporation Act, 12 U.S.C. § 1864, which provided that bank service companies may not "engage in any activity other than the performance of bank services for banks").

C. The Legislative History of the FCUA Confirms That Section 1759 Was Intended to Protect the Economic Viability of Credit Unions, Not to Protect Banks from Competition.

The legislative history of the FCUA confirms that Section 1759 was intended to benefit the members of credit unions, rather than protect banks from competition. Indeed, the historical record shows that Congress did not regard credit unions and commercial banks as competitors. For example, the FCUA of 1934 did not even authorize deposit insurance for federal credit unions, even though Congress *required* all national banks to obtain federal deposit insurance as a prerequisite to remaining in operation.

The first credit union organized in the United States was La Caisse Populaire of Manchester, New Hampshire, founded in 1908 by parishioners of St. Mary's Church but open to all residents of the city. The first credit union statute was adopted by Massachusetts in 1909. *See La Caisse Populaire Ste. Marie v. United States,* 563 F.2d 505 (1st Cir. 1977). Thereafter, the credit union movement spread throughout the United States, due primarily to the financial support and evangelical efforts of Edward Filene, a Boston department store magnate.[2/] By 1934, 38 States had adopted laws authorizing establishment of credit unions.[3/]

[2/] *Credit Unions: Hearing before a Subcommittee of the Senate Committee on Banking and Currency*, 73rd Cong., 1st Sess. 18-19 (1933)(hereinafter "*Credit Union Hearing*"); 78 CONG. REC. H12224 (1934).

[3/] H.R. REP. NO. 2021, 73rd Cong., 2d Sess. 2 (1934).

The Great Depression demonstrated the need for federal credit union legislation. Due to the contraction of the money supply, many individuals and small businesses were unable to obtain credit from commercial banks at any terms, and were forced to borrow from usurers and loan sharks.[4/] Massive bank failures in 1932-33 also resulted in substantial losses for millions of people whose deposits were not insured. In this climate, credit unions emerged as an attractive means of stimulating saving and extending credit to individuals of small means who could not obtain these services elsewhere. However, credit unions were not permitted in ten states, and their formation was discouraged in other states by ineffective authorizing statutes or discriminatory taxes.[5/] In 1932, Congress adopted credit union legislation for the District of Columbia. Pub. L. No. 72-190. In June 1933, Congress began considering comprehensive federal credit union legislation modeled on the prior District of Columbia legislation.[6/] Finally, in June 1934, Congress adopted the FCUA, Pub. L. No. 73-467.

The FCUA was intended to preserve the purchasing power of consumers, and allow them to participate in the recovery, by eliminating

> usurious interest money lending in the only way it can be done, namely, by enabling the average man to combine with his fellows to the end that, working

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[4/] S. REP. NO. 555, 73rd Cong., 2d Sess. 3-4 (1934).

[5/] S. REP. NO. 555, *supra*, at 4.

[6/] S. REP. NO. 555, *supra*, at 2.

together, they may solve their own short-term credit problems at normal rates.[7/]

On the Senate floor, credit unions were described as a "happy medium between the loan shark and the bank, which cannot extend credit to many of these people [of ordinary means], because they do not have the required security."[8/] In House debate, Banking and Finance Committee Chairman Steagall stated that credit unions "are not comparable in the matter of their resources and the nature of the organization and the service they render to the institutions [national banks] that are supervised by the Comptroller of the Currency."[9/]

Congress regarded commercial banks and mutual associations of savers as fundamentally different businesses, and believed that federal credit unions would remedy a flaw in the structure of the financial industry by serving an unmet need.[10/] This point is dramatically illustrated by the fact that Congress, in the Banking Act of 1933, required all surviving national banks to obtain deposit insurance from the Federal Deposit Insurance Corporation, upon condition of satisfying the agency's financial safety criteria. The same Congress, however, did not provide deposit insurance for credit unions.

7/ 78 CONG. REC. S7260 (1934).

8/ 78 CONG. REC. S7259 (1934).

9/ 78 CONG. REC. H12224 (1934).

10/ "These credit unions, nationally extended, will close the great gap in the credit structure, a gap which leaves men and women of small means . . . largely at the mercy of usurious money lenders." 78 CONG. REC. S7259 (1934)(Senator Shepard).

This action demonstrates that Congress regarded these infant non-profit mutual assistance organizations as a different type of institution, involving materially different risks, from commercial banks.

D. Other Actions Dispel the Notion That the 73rd Congress Intended to Protect Banks from Competition by Credit Unions.

The 73rd Congress believed that commercial banks were partly responsible for triggering the Depression and imposed severe federal regulation on this industry through the Banking Act of 1933 to prevent the recurrence of these events. The historical record of actions taken by this Congress to confine and regulate the banking industry contradicts the banks' current argument that the Court should read into the FCUA a Congressional intention to protect commercial banks from competition by the infant federal credit unions.

In the early 1930s, commercial banks were perceived, both by the public and Congress, as having fostered the stock market crash and the Depression through reckless lending to speculative ventures and ill-considered participation in the securities markets.[11/] Further, waves of bank failures over several years inflicted multi-billion dollar losses on uninsured depositors and creditors of banks. Approximately one-fifth of all commercial banks, holding nearly one-tenth

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11/ Anna J. Schwartz, *Financial Stability and the Federal Safety Net*, *in* RESTRUCTURING BANKING AND FINANCIAL SERVICES IN AMERICA 34 (William S. Haraf and Rose Marie Kushmeider eds. 1988).

of all deposits, suspended operations between 1929 and 1933.[12/]

The United States experienced an initial wave of bank failures in October 1930 and a second wave in March 1931. These crises prompted depositors to make large-scale withdrawals from surviving banks. In response, banks sought to strengthen their reserves by liquidating investments and refusing to renew loans as they came due, in order to meet the public demand for currency. These actions had a multiplier effect on the contraction of the money supply, reduced asset prices, and deepened the Depression. Finally, the so-called "Bank Panic" struck in late February 1933, just prior to the inauguration of President Roosevelt. By March 3rd, banks in half the states had been closed by government order. On March 4th, the State of New York declared a bank holiday, and the Federal Reserve Banks closed. The same day, President Roosevelt specifically criticized the banking industry in his inaugural address. On March 6, he declared a national bank holiday to prevent the spread of the crisis.[13/]

The collapse of the banking system prompted the 73rd Congress to restructure the industry by forcing commercial banks to divest their securities affiliates and by imposing strict regulatory controls on surviving banks, in return for the

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12/ MILTON FRIEDMAN AND ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 299, 351 (1963).

13/ EDWARD L. SYMONS, JR. AND JAMES J. WHITE, BANKING LAW 35 (1991); FRIEDMAN AND SCHWARTZ, *supra*, at 308, 311, 313, 420-422.

grant of deposit insurance.[14/] On June 13th, both Houses of Congress passed the Banking Act of 1933, which was signed by the President on June 16th. Pub. L. No. 73-66, 48 Stat. 162. This law included four provisions, known collectively as the Glass-Steagall Act (Sections 16, 20, 21 and 32, 12 U.S.C. §§ 24, 377, 378, 78), which mandated separation of commercial and investment banking.[15/] That law also severely regulated the activities of open banks by, *inter alia*, prohibiting the payment of interest on demand deposits and

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14/ Support for the legislation was generated in hearings before the Senate Committee on Banking and Currency, which became known as the "Pecora hearings" after the subcommittee chief counsel. *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking and Currency on S. Res. 84 and S. Res. 56*, 73d Cong., 1st Sess. (1933). These hearings highlighted objectionable practices by the banks and their affiliates, and became "a conduit for populist sentiment to punish Wall Street." *See* Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUMBIA L. REV. 10 (1991); A. SCHLESINGER, THE AGE OF ROOSEVELT -- THE COMING OF THE NEW DEAL 435-38, 442-445 (1958); R. LITAN, WHAT SHOULD BANKS DO? 27 (1987); RON CHERNOW, THE HOUSE OF MORGAN 366-367 (1990).

15/ For example, Senator Glass of the Banking and Currency Committee asserted that "one of the greatest contributions to the unprecedented disaster which has caused this almost incurable depression was made by these bank affiliates." 75 CONG. REC. 9887 (1932). House Banking and Currency Committee Chairman Steagall stated that prior to the stock market crash, "[o]ur great banking system was diverted from its original purposes into investment activities, and its service devoted to speculation in international high finance." 77 CONG. REC. 3835 (1933).

imposing stringent eligibility standards for deposit insurance. FRIEDMAN AND SCHWARTZ, *supra*, at 442-443.[16/]

The same committees that drafted the Glass-Steagall Act also prepared the Federal Credit Union Act. Indeed, a subcommittee of the Senate Banking and Currency Committee held its first hearing on the FCUA on June 1, 1933, while that committee was involved in devising the final version of the Glass-Steagall Act. *Credit Union Hearing, supra*. The committees, in drafting the FCUA, were concerned with two issues: whether federal credit unions could help defeat the abuses of loan sharking; and whether they would be financially stable. Credit union supporters demonstrated that they could make loans to people of ordinary means at rates far less than those charged by loan sharks.[17/] Proponents also demonstrated that no

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16/ This Court previously has recognized the anti-bank sentiment of the 73rd Congress. *Investment Co. Inst. v. Camp*, 401 U.S. at 634, 639. In *Board of Governors of the Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. 46, 61 (1981), the Court found that:

> the Glass-Steagall Act was enacted in 1933 to protect bank depositors from any repetition of the widespread bank closings that occurred during the Great Depression. Congress was persuaded that speculative activities, partially attributable to the connection between commercial banking and investment banking, had contributed to the rash of bank failures. (Footnote omitted).

17/ At the time Congress voted on final passage of the FCUA, twenty states had adopted legislation *limiting* the amount finance companies could charge small borrowers to 42% per annum. 78 CONG. REC. S7259, H12223.

credit unions had failed during the Depression.[18/] Neither the Committee Reports nor the statements in the floor debates on the FCUA indicate any concern over competition between commercial banks and federal credit unions, much less a concern to limit the field of membership of credit unions to protect banks from competition.

This historical record thus refutes any suggestion that, in adopting the FCUA, the 73rd Congress abandoned its antagonistic attitude toward the banking industry and sought to protect this dominant industry from infant federal credit unions.

II. SECTION 1759 AUTHORIZES NCUA TO ADD MULTIPLE EMPLOYER GROUPS TO EXISTING CREDIT UNIONS TO ENHANCE THEIR SAFETY AND SOUNDNESS.

The court of appeals violated *Chevron* by failing to defer to the NCUA's reasonable interpretation of the field of membership provision, including its common bond subclause. In devising an interpretation of the law that allegedly was "clearly discernible," but had not been advocated by any party, the D.C. Circuit ignored the principal part of Section 1759. *First Nat'l Bank and Trust Co. v. NCUA*, 90 F.3d 525, 527 (D.C. Cir. 1996). The independent clause in that provision grants the NCUA substantial discretion in defining the membership of credit unions and expressly permits separate organizations to join a single credit union. The court also failed to consider the

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18/ *Credit Union Hearing, supra*, at 19-20; S. REP. NO. 555, *supra*, at 2; 78 CONG. REC. H12223 (1934)(remarks of Banking and Currency Committee Chairman Steagall).

interrelationship between Section 1759 and other parts of the FCUA. Considering all parts of the law in context, the common bond provision is a flexible standard designed to ensure the safety and soundness of credit unions, whose application may be varied as conditions require, rather than an unambiguous commandment having a fixed, narrow meaning.

A. The Statutory Provision Is Ambiguous.

On its face, the term "common bond" is ambiguous and has no established meaning. The phrase is not further defined in the FCUA. Nor was it a term with a standard meaning in the financial services industry. The court of appeals itself recognized that "[n]either syntactical argument" presented by the opposing parties about the meaning of this term "is convincing." 90 F.3d at 528. This finding itself suggests that there is an ambiguity in the statutory language, which Congress meant the regulatory agency to fill.

The clearest proof that the phrase "common bond" is ambiguous is presented by the pleading the banks already have filed in this Court. The D.C. Circuit discovered an interpretation of the common bond provision that differed from those offered by the NCUA and the banks. In opposing the petitions for *certiorari*, the banks did not rely upon the construction articulated by the court of appeals, but fell back upon the interpretation that they had argued below -- and which the court rejected.

In addition, the fact that the district court in this case, the district court in the Sixth Circuit case, and the dissenting judge in the Sixth Circuit agreed with the NCUA's interpretation is further evidence that the term does not have

a narrow, fixed meaning.[19/] Judge Jones, dissenting in the Sixth Circuit, correctly concluded that:

> The common bond provision can be read one of two ways. Either the provision requires that each group in a credit union have a common bond with the other groups in the credit union, or the provision requires that each group joining a credit union have a common bond among the members of the group, but not necessarily a common bond with the other groups in the credit union. The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement and determine which reading of the statute is appropriate.

1997 WL 175314 at *8.

In sum, this Court is presented with three different interpretations of the meaning of "common bond": one adopted by the NCUA, one advocated by the banks, and one the D.C. Circuit discovered and the Sixth Circuit endorsed. This pattern demonstrates by itself that the phrase is ambiguous. In these circumstances, *Chevron* provides that the Court should defer to the agency's interpretation.

19/ *First City Bank v. National Credit Union Admin. Bd.*, 1997 WL 174314 (6th Cir. 1997) (Jones, J. dissenting); *see Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1732-1733 (1996).

B. The Court of Appeals Ignored the Principal Part of Section 1759.

The court of appeals did not discuss the primary part of Section 1759, which constitutes an independent grant of authority to NCUA to define the appropriate field of membership of a credit union, and to authorize multiple "organizations" to come together to form a single credit union. The court thereby ignored two important provisions of the statute, which directly contravene its interpretation of the text. It thus erred in deriving a "clearly discernible" meaning from an incomplete text. *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2182 (1993)("Statutory construction . . . at a minimum, must account for a statute's full text").

1. Section 1759 provides that federal credit union membership shall consist of "the incorporators and such other persons and *incorporated and unincorporated organizations*" as may be elected to membership and purchase "at least one share" of the credit union's stock. (Emphasis added). The plural noun "groups" in the dependent clause (the common bond provision) refers back to the plural noun "organizations" in the independent clause of Section 1759.

By authorizing multiple "organizations" to come together to form a single credit union, the plain language of Section 1759 supports the NCUA's position that Congress permitted membership in a single credit union to be open to multiple employee groups, each of which is organized along its own internal lines, and which may come together with other organized groups of saver/owners to establish a cooperative institution to promote thrift. Nothing in this language, authorizing several organizations to come together

in one credit union, suggests that Congress intended to limit workers' rights of free association so that they could engage in cooperative self-help measures only with others employed by the same company or within the same industry segment.

2. Section 1759 further provides that federal credit union membership shall consist of "the incorporators and such other persons and incorporated and unincorporated organizations, *to the extent permitted by rules and regulations prescribed by the Board*," as may be elected to membership and purchase shares. (Emphasis added). This specific grant of authority to define, by rule, which persons should be permitted to join an individual credit union is distinct from the general rulemaking authority granted the regulator under the original Section 16 of the FCUA, 48 Stat. 1221 (codified at 12 U.S.C. § 1766(a)). The inclusion of this specific rulemaking authority therefore suggests that Congress vested the NCUA with considerable discretion to determine the field of membership that would be appropriate under various conditions. *See Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Syst.*, 468 U.S. 207, 214 (1984). Accordingly, the NCUA's field of membership policy is entitled to substantial deference. *Id.* at 215-216.

C. The Court of Appeals Ignored the Statutory Context in Which the Field of Membership Provision Appears.

The court of appeals also erred by failing to take into account the statutory context in which the field of membership provision appears and the statutory mechanism of which it is an indispensable element. *See Clarke*, 479 U.S. at 401.

1. As discussed above, the FCUA establishes a process and standard by which NCUA may evaluate the proposed field of membership of a new credit union or additions to an existing institution. The statute requires a formal submission to the agency in which the proposed field of membership is described "in detail". Consideration of the proposed field of membership is a mandatory prerequisite to NCUA's approval of the application. The law further prescribes the substantive criterion the NCUA must use in reviewing the field of membership and other parts of the application -- whether creation or expansion of such a credit union is "economically advisable".

Thus, the field of membership provision, including its common bond subclause, factors into a decision making formula designed to ascertain and protect the financial stability of a credit union. The banks' proposed interpretation of the common bond subclause would divert the field of membership inquiry from its original function, and transform the test to serve a substantially different end from the one Congress defined.[20/]

2. From its inception, the field of membership provision and its common bond component were tied closely to protection of the economic viability of a credit union. The

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20/ At various times, the banking industry has pointed to the common bond provision as a device Congress included to limit competition banks experience from credit unions, to offset the competitive advantage credit unions allegedly receive from their tax-exempt status. This cannot be the case, however, because federal credit unions were not granted tax exemption until 1937, Pub. L. No. 75-416, 51 Stat. 4, three years after the common bond component was enacted.

original language of Section 4, as it first passed the Senate (S. 1639), mirrored exactly the counterpart language of the 1932 law which authorized credit unions in the District of Columbia. Pub. L. No. 72-190, § 4(3), 47 Stat. 326, 327. Section 4(3) originally provided that the regulator was to determine whether the certificate of incorporation conformed to the provisions of the Act, the fitness of the subscribers, and "the advisability of establishing a Federal Credit Union in the proposed field of membership." 78 CONG. REC. S8459 (1934).

The House replaced S. 1639 with its own version of the FCUA, which contained minor modifications. One amendment changed the "advisability" language in Section 4(3) into the final version enacted into law, which required the regulator to determine the "economic advisability of establishing the proposed Federal credit union." 78 CONG. REC. H12222 (1934). Through this change, Congress focused the application of the field of membership provision, including its common bond component, even more closely on protecting the economic viability of the credit union.

Accordingly, the legislative history confirms the meaning that is explicit in the structure of the FCUA, that the NCUA's consideration of the composition of the membership of a proposed credit union serves to protect the economic safety and soundness of the institution.

D. The Court Should Defer to the NCUA's Interpretation of the FCUA.

Chevron and its progeny establish that when the language of a regulatory statute is ambiguous, the courts should defer to the interpretation of the law adopted by the agency, as long as that construction is reasonable. Many of

the cases applying that doctrine involve decisions where the Court unanimously upheld agency interpretations that allowed commercial banks to expand the types of financial services they may offer customers, over opposition from other segments of the financial services industry.[21/]

The court of appeals should have followed the principle of deference in this case. The banks have erroneously argued that a broad statutory term in the FCUA is unambiguous and permits of only one possible meaning, no matter how much market conditions may change. The narrow interpretation the banks propose would deprive millions of Americans access to affordable credit union

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21/ *Smiley v. Citibank (South Dakota), N.A.*, 116 S. Ct. at 1730 (upholding under *Chevron* agency interpretation of the term "interest" in the National Bank Act to allow banks to charge late payment fees that were prohibited in the State where the cardholders resided); *Nationsbank of North Carolina, N.A. v. VALIC*, 513 U.S. 251 (1995) (upholding under *Chevron* agency decision that acting as an agent in the sale of insurance was "incidental" to the "business of banking" under the National Bank Act); *Clarke v. Securities Indus. Ass'n*, 479 U.S. at 388 (upholding under *Chevron* agency interpretation of the term "branch" under the National Bank Act as not extending to offices at which banks provide discount brokerage services); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 468 U.S. at 207 (upholding agency decision that acquisition of a discount broker was "closely related" to the business of banking, within the meaning of the Bank Holding Company Act, and did not violate Glass-Steagall); *Board of Governors of Fed. Reserve Sys. v. Investment Co. Inst.*, 450 U.S. at 46 (upholding agency decision that acquisition of an investment adviser to a closed-end investment company mutual fund was "closely related to banking", within the meaning of the Bank Holding Company Act, and did not violate Glass-Steagall).

services, especially employees of small businesses. This construction also would deny the NCUA the authority to ensure the safety and soundness of the credit union system, by depriving individual credit unions of the diversity in membership necessary to minimize risk and avoid the adverse effects of a downturn in the business affairs of a single underlying company or business. Finally, the banks' reading would deprive credit unions, alone among all classes of federally insured financial institutions, of the ability to take advantage of the economies of scale that are essential to providing their services to members in a cost-effective manner.

Among consumers, employees of small businesses will be especially harmed by the D.C. Circuit's narrow reading of the common bond requirement. Under its interpretation, many employers will be too small for their workers to support a viable credit union. NCUA has concluded that, for safety and soundness reasons, a federal credit union must have at least five hundred potential members in order to be viable. According to the Small Business Administration, however, in 1994 more than 62% of all American jobs are provided by companies with fewer than five hundred employees.

The D.C. Circuit's failure to follow *Chevron* and defer to the NCUA's interpretation of Section 1759 threatens to deny the right of cooperative financial association to the vast proportion of working Americans. The NCUA's construction of the common bond component was an appropriate exercise of its discretion under a broad statutory provision, under which Congress gave the regulator flexibility to adjust the field of membership of credit unions to preserve safety and soundness in response to changing

economic conditions. The NCUA's interpretation should be sustained.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be reversed.

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NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

and

AT&T FAMILY FEDERAL CREDIT UNION AND
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,

v.

FIRST NATIONAL BANK AND TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF OF *AMICI CURIAE* AD HOC SMALL EMPLOYERS GROUP, NATIONAL COOPERATIVE BUSINESS ASSOCIATION, CAMPUS CREDIT UNION COUNCIL, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC., IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

This brief is submitted in support of petitioners jointly on behalf of four independent entities. The first is an *ad hoc* group of small employers with employees belonging to federally chartered credit unions. The sponsoring employers are listed at Appendix A attached hereto. The second is the National Cooperative Business Association ("NCBA"), a national trade association representing cooperatives.[1] The third is the Campus Credit Union Council, a credit union trade association representing credit unions serving college students. The fourth is the Associated Builders and Contractors, Inc. ("ABC"), a national trade association representing construction and construction-related firms across the country. All four amici share a strong interest in the outcome of this case.

Interest of Amicus Small Employers Group

The *ad hoc* group of small employers consists of both manufacturing and service companies. The overwhelming majority of these companies employ less than the 500 employees recognized by the National Credit Union Administration (NCUA) as the bare minimum number required to form their own federally chartered credit unions.[2] According to the most recent Census Bureau Population Survey, nearly sixty-three million employees in the United States work in

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[1] Pursuant to Rule 37.6, Amici note that no counsel for any party had any role in authoring this brief and no person other than Amici and their members made any monetary contribution to its preparation or submission. Amicus NCBA notes that petitioner Credit Union National Association is a member of the National Cooperative Business Association.

[2] NCUA Chartering and Field of Membership Manual, Revised 7/94, Section 1, page 12. Practical considerations of scale effectively limit small employers from forming their own credit unions even in the absence of the NCUA Manual requirement. The organizational and financial requirements of setting up and operating a credit union exceed the capabilities of most employers with less than approximately 2000 employees, let alone the 500 used as a guideline in the manual.

companies with less than 500 employees. This represents about sixty-two percent of the total American work force. The Court of Appeals' interpretation of the "common bond" requirement effectively precludes employers with less than 500 employees from offering federal credit union services to their employees.

The appellate court's ruling therefore hits small employers, and their employees, with particularly deadly force. Unless it is overturned, the lower court's ruling would eliminate entirely the benefits of workplace-sponsored federal credit union membership for nearly sixty-three million members of the American work force. Many small employers regard their ability to sponsor credit union membership to be an important workplace benefit that allows them to compete with much larger employers. Many employees of small firms rely heavily on the benefits of their credit union membership, including convenient workplace access to financial services, automatic deposit and savings plans, and the availability of credit on fair terms. Both the small employers and their employees who have come to rely on the benefits of credit union membership will suffer a sharp disappointment of their justified expectations based on a fifteen- year history of consistent interpretation of the Federal Credit Union Act by the NCUA if the lower court's ruling is allowed to stand. Moreover, because employees of smaller firms have, on average, lower wages and fewer benefits than employees of large companies, the appellate court's ruling disproportionately injures precisely the same group the Federal Credit Union Act was intended to benefit--individuals of "small means."

Interest of Amicus National Cooperative Business Association

Amicus curiae National Cooperative Business Association (NCBA)[3] is a national, cross-industry membership and trade association representing cooperatives--over 100 million Americans and 45,000 businesses. Founded in 1916, NCBA's membership includes cooperative businesses in the fields of housing, health care, finance, insurance, child care, agricultural marketing and supply, rural utilities and consumer goods and services as well as state and national associations of cooperatives. Our membership includes the Credit Union National Association (CUNA), petitioners in this case, and the National Association of Federal Credit Unions (NAFCU), and other national and state associations of credit unions.

NCBA represents cooperatives before Congress and the federal agencies and promotes and supports cooperatives in the U.S. and overseas through training and technical assistance programs and publications.

The membership of NCBA has a strong interest in this case. The mission of NCBA is "to develop, advance and protect cooperative enterprise," including credit unions, which are cooperatives. The mission is based on the commitment of our members to the fact that cooperatives offer individuals a way of joining others in creating cooperative businesses to meet economic needs that might otherwise go unmet. Each year, a Statement of Policy is voted on by our membership as part of our annual meeting. The 1997 Statement of Policy in part expresses the support of our members for credit unions generally, and specifically supports credit unions on the field of membership issues raised in this case.

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[3] Legally, the Cooperative League of the USA doing business in the United States as the National Cooperative Business Association.

NCBA would be directly and adversely affected by an adverse decision in this case because we offer our employees membership in a credit union that was created under a separate common bond of membership. In addition, many of our members belong to credit unions with multiple common bonds, and they would also be adversely affected.

Interest of Amicus Campus Credit Union Council

Amicus curiae Campus Credit Union Council ("CCUC"), founded in 1985, is a credit union trade association representing credit unions serving college students. CCUC currently has 26 member student credit unions representing over 70,000 college student credit union members nationwide with the number of potential undergraduate student members exceeding 400,000[4]. A "student credit union" is a student-run cooperative financial institution whose primary field of membership includes students and alumni of a college or university. The term also includes any credit union that has a college student body in its field of membership and actively serves college students through an on-campus branch or desires to further offer credit union services to college students. CCUC provides development and training services to stand-alone college student credit unions, student-run branches and other credit unions serving the unique needs of college students. In addition, CCUC promotes educating students in the credit

[4] This figure is based on current undergraduate enrollment numbers from the following colleges and universities: San Jose State University, Georgetown University, University of Illinois, Minnesota State University, University of Missouri, Rutgers University, Columbia University, Fordham University, Skidmore College, Miami University (Ohio), University of Toledo, Kent State University, University of Pennsylvania, UCLA, University of California (Berkeley), Purdue University, Babson College, University of Massachusetts, University of Oregon, University of Michigan, Mary Washington College, George Mason University, James Madison University and Virginia Polytechnic University.

union philosophy and marshals resources to effectively assist college student credit unions in becoming full service financial institutions.

CCUC and the college student credit unions it represents have a strong interest in this case. CCUC believes that credit unions provide unparalleled benefits to students. Student credit unions educate students on thrift and credit management, involve students in the daily operations of the credit union and offer students financial products at more favorable rates and fees than those charged by banks. CCUC opposes any legislative or regulatory effort that would hinder the ability of credit unions to provide financial services to college students. CCUC believes that the lower court's decision in this case, if upheld, will have a crippling effect on the entire credit union system and will jeopardize, each year, the ability of over 100,000 college students to access reasonably-priced financial services provided by student credit unions.

Interest of Amicus Associated Builders and Contractors, Inc.

Amicus Curiae Associated Builders and Contractors, Inc. ("ABC"), is a national trade association representing more than 19,000 construction and construction-related firms across the country. ABC established the "ABC Credit Union" in 1975 to provide its member companies with the option of offering membership in the credit union as a benefit to their employees. In 1990, ABC merged the ABC Credit Union with the IR Federal Credit Union to better service its members. More than 860 separate employer groups of ABC member firms participate in this one credit union. Over 16,000 employees of ABC member firms hold savings in excess of $6.2 million and loans of more than $3 million in this credit union.

ABC and the building and contractor firms it represents have a strong interest in this case. The construction industry is primarily comprised of hourly employees, both skilled and

unskilled, who typically work for more than one employer in the course of a year. The industry is cyclical and transient in nature. Credit union participation by these construction workers that is portable from one employer to another is a valued benefit offered to these employees. Between the court-ordered October 25 enrollment cutoff and the December 24 partial stay allowing new members to join existing groups (but not new groups), more than 300 employees of ABC's member firms were denied the right to participate in a credit union. (These employees and all other SEG members face possible "divestiture" if the NCUA interpretation is disallowed.)

Employees of ABC's member firms exemplify the portion of the public most directly intended by Congress to be served by credit unions -- those most likely to be in need of access to convenient, affordable financial services. Upholding the lower court's rulings in this case will cause substantial injury to that very portion of the public intended by Congress to be protected by the Federal Credit Union Act.

SUMMARY OF ARGUMENT

The Court of Appeals' interpretation of the Federal Credit Union Act would adversely affect small employers, cooperative businesses, college campus credit unions, builders and contractors, and all those individuals affiliated with those groups who presently are eligible for the benefits of federal credit union membership. Many of those groups and individuals have come to rely on those benefits, and will be deprived of them by the restrictive interpretation of the "common bond" requirement proposed by the lower court. That restrictive interpretation is contrary to the broad remedial purposes of the Act, and should be reversed.

ARGUMENT

I. THE COURT OF APPEALS' RESTRICTIVE READING OF THE FIELD OF MEMBERSHIP REQUIREMENT IS INCONSISTENT WITH THE BROAD REMEDIAL PURPOSES OF THE FEDERAL CREDIT UNION ACT.

The Federal Credit Union Act ("FCUA") was adopted in 1934, at a time in our history when Congress was primarily concerned with attempting to help the country pull itself out of the Great Depression. The Act's Preamble expressly states its purpose to:

> establish a Federal Credit Union System, to establish a further market for securities of the United States and *to make more available to people of small means credit for provident purposes through a national system of cooperative credit*, thereby helping to stabilize the credit structure of the United States.

Federal Credit Union Act, Pub. L. 73-467, 48 Stat. 1216 (1934)(emphasis added).[5]

At least two elements of the quoted language from the Preamble argue strongly in favor of a broad construction of all provisions of the Act bearing on the scope of federal credit union membership. First, the expressed purpose of the Act is to "make more available" the benefits of credit union membership to "people of small means." Thus the clearly articulated purpose of the Act is expansive--to include *more* individuals within its scope. Second, the Act was concerned

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[5] The legislative history of the Act specifically recognizes Congress' intent to make credit available to more individuals at non-usurious rates and to encourage some organized method for saving. *See* S. Rep. No. 555, 72d Cong, 2d Sess. 2 (1934).

with establishing a "*national system* of cooperative credit"-- an expansive allusion to the nationwide availability of credit union services foreseen by the 1934 Congress.

However, the Court of Appeals' interpretation of the "common bond" requirement has the opposite effect. It severely limits the availability of federal credit union services. Worse, that limitation disproportionately impacts precisely those whom Congress intended in 1934 to benefit--individuals of "small means." As is demonstrated at greater length below, at pp.14-15, employees of small and mid-sized companies tend, on average, to be paid less, and to enjoy fewer benefits, than employees of large firms. They also tend to rely more heavily on the benefits of credit union membership. But it is precisely those small and mid-sized employers--with less than 500 employees--who will be effectively barred from offering credit union services to their employees under the Court of Appeals' holding.

The appellate court ignored this powerful evidence of Congressional intent from the language of the Act itself in its application of the two-step analysis of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The appellate court never even reached the second step of *Chevron*--requiring deference to the interpretation of the agency charged with administering the Act--because it held that the Section 109 language at issue relating to the common bond requirement unambiguously barred multiple fields of membership.

Amici do not here repeat the textual arguments regarding Section 109 ably presented by petitioners showing that the court was mistaken in reaching this conclusion. But amici submit that the court was mistaken in its application of *Chevron* to the facts before it, and not solely because it refused to reach step two of the *Chevron* analysis. The lower court

applied *Chevron* as though it superseded accepted tenets of statutory construction. But *Chevron* must be read in conjunction with elementary principles of statutory interpretation, including the well-accepted principle that *all* the provisions of a statute must be read together so as to give meaning to each, and, wherever possible, to be consistent with each other. E.g., *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993)("[i]n expounding a statute, we must be guided not by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.")(quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849)).

Indeed, *Chevron* expressly requires that courts "must give effect to the unambiguously expressed *intent* of Congress" if that intent is expressed in sufficiently clear terms. 467 U.S. at 842-843 (emphasis added). Here, Congress *has* expressed its clear intent to make federal credit union services broadly available to more individuals. The lower court mistakenly focused solely on the Section 109 language relating to the "common bond" requirement, in isolation, and without reference to other provisions of the Act that inform the meaning of Section 109 and require a broad interpretation of that provision in order to be consistent. Had the court looked to other such language in the Act--specifically, the statement of purpose in the Act's Preamble--the court would have been forced to conclude that Congress clearly expressed its intent in 1934 to require a broad interpretation of the common bond requirement, instead of the restrictive interpretation the court adopted.

As the Preamble makes clear, the underlying purposes of the Act were remedial and salutary. At a time of great economic privation, Congress intended to extend the benefits of credit union services to "people of small means" for

"provident purposes." In 1982--another time of economic strain and hardship for financial services providers--NCUA correctly interpreted Section 109 of the Act to mean that federally chartered credit unions could include within their field of membership more than one group with a "common bond." The appellate court's judicial overruling of the NCUA's interpretation of its own enabling statute is unsupported by the Act itself, by Congressional intent, or by *Chevron* principles properly applied.

II. THE LOWER COURT'S RESTRICTIVE INTERPRETATION WOULD HAVE DEVASTATING EFFECTS ON EXISTING FEDERAL CREDIT UNIONS AND THOSE WHO USE THEM.

Small employers, many cooperative businesses, campus credit unions, and many builders and contractors would be severely and adversely affected by the appellate court's ruling. The availability of employer-sponsored credit union membership is a significant benefit to the employees and members of all four groups, allowing them access to convenient checking, deposit, credit and savings services that many could not otherwise access or afford.

A. Small Employers and their Employees Would Be Deprived Entirely of the Benefits of Employer-Sponsored Federal Credit Union Services, and Would Be Impaired In Their Ability To Compete.

(1) *Over 62 percent of the workforce would be deprived of access to employer sponsored federal credit unions.*

The chartering manual of NCUA specifies 500 individuals as the recommended *minimum* for the size of any group

applying for a federal credit union charter.[6] In practice, NCUA approves few charters for groups consisting of only 500 individuals. Because only about 40 percent of the individuals in any group will typically join a sponsored credit union, a more practical "threshold size" is closer to 2,000.

Even aside from the NCUA's chartering guidelines and practices, economies of scale generally make setting up and operating a credit union servicing less than four or five hundred members prohibitively expensive. Applying for a charter, securing and leasing office space, maintaining bookkeeping, administrative and managerial functions, and attracting sufficient deposits to offer meaningful credit services to its members all require a "critical mass" of members for a credit union. That critical mass exceeds a group of 500 possible members. According to the most recent Census Bureau Population Survey, nearly sixty-three million employees in the United States work in companies with less than 500 employees. This represents about sixty-two percent of the total American work force.[7]

So long as credit union fields of membership include different groups with a common bond among the members of each group, small and mid-size firms and their employees can continue to enjoy the benefits of credit union membership. Typically, small employers have sponsored and formed Select Employee Groups ("SEGs"), or a group of individuals who share the common bond of having the same employer. These SEGs can then join a larger, existing credit union, or band together to create one of their own that has enough members to

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[6] NCUA Chartering and Field of Membership Manual, Revised 7/94, Section 1, page 12.

[7] Source: March 1996 Current Population Survey, Bureau of the Census.

make it economically feasible. About 3,600 federal credit unions have at least one SEG. Among these 3,600, the average credit union has 40 SEGs, with an average of 72 members per SEG.[8]

Under the appellate court's interpretation of the common bond requirement, however, small employers and their employees would be barred entirely from access to employer-sponsored credit unions. This would constitute a serious deprivation to the many members of SEGs who have come to rely on credit union services to help organize their finances, to establish savings and automatic deposit plans, and to give them access to credit they would otherwise be unable to obtain.

(2) *Small employers would be at a competitive disadvantage to employers large enough to charter their own credit unions.*

The appellate court's ruling is also a significant blow to small and mid-sized employers, who regard their sponsorship of credit union membership as a substantial benefit they can offer employees. Availability of credit union membership helps small employers attract desirable employees. If they are no longer able to offer this benefit to employees and prospective employees, they will suffer a further competitive disadvantage compared to firms large enough to charter and operate their own credit unions.

Most small employers already face challenges from larger and better financed competitors on a number of different fronts--access to suppliers, access to financing and credit, pricing pressures created by economies of scale available to large competitors, and the operational hurdles of doing business on a small scale. Elimination of small employers' ability to

[8] Source: Economics and Statistics Department, Credit Union National Association.

sponsor credit union membership would add yet another area where they would be disadvantaged with respect to their larger competitors--in the marketplace for employees.

And yet small businesses have traditionally formed the backbone of American enterprise, driving employment, growth, change and innovation in many fields. Moreover, there are few large, successful corporations that did not start out as small businesses. Putting additional impediments in the way of small business success is precisely the kind of bad policy avoided by NCUA's interpretation of the common-bond requirement.

(3) *Employees of small employers have come to rely on the many benefits of credit union service pursuant to a fifteen year-old interpretation of the Act.*

The harm to small employers and their employees is intensified by their justifiable reliance on a well-established fifteen year-old interpretation of the common bond requirement by the agency charged with administering the Credit Union Act, the NCUA. Since 1982, when NCUA promulgated its "common bond" interpretation allowing SEGs, the growth of this membership class of individuals has been steady and sustained. Today, over 10.5 million of the approximately 44.2 million credit union members--or about 24 percent--are members of SEGs.[9] The employers who formed SEGs as well as the employees who joined them have come to rely on the availability of credit union services. Savings, automatic deposit, the availability of credit on fair terms without the onerous and sometimes prohibitive demands of investor-owned financial institutions have become a way of life to many who would not otherwise have access to those services. Credit

[9] Source, December 1996 Data, Economics and Statistics Department, Credit Union National Association; NCUA.

union membership is a strong force promoting fiscal responsibility for many. Being deprived of the opportunity for such membership will be a significant financial step backward for many employees of small firms and their families.

(4) *The appellate court's ruling disproportionately harms precisely those whom the Credit Union Act was intended to benefit--individuals of small means.*

Analysis of recent Census data demonstrates that employees of firms with 1-9 workers, on average, earn only $.68 for every $1.00 earned by employees of firms with 500 or more workers. Employees of those larger firms earn, on average, $10,000 more annually than do employees in the smallest firms. Other workplace benefits, such as health insurance and pension coverage, are also, on average, more readily available to employees of firms with more than 500 workers.[10]

Therefore, on average, workers at small firms earn less, and have fewer benefits, than their counterparts at large companies. It is precisely such individuals of "small means" that Congress expressly intended to benefit when the Federal Credit Union Act was passed into law.

But it is *also* individuals of small means who are most directly affected, and most directly harmed, by cutting off their eligibility to participate in employer-sponsored credit unions. The appellate court's ruling therefore has the ironic effect of disproportionately harming the very group the Act was intended to benefit.

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[10] Woodbury, S., Smith, D., and Kelly, W., "An Analysis of Public Policy on Credit Union Select Employee Groups" at 2-3 (Filene Research Institute and Center for Credit Union Research, School of Business, University of Wisconsin-Madison, 1996).

For many individuals, credit union membership can mean the difference between fiscal responsibility and serious financial difficulties. A number of features common to credit unions make them especially appealing to lower-wage workers. These features include the following: (i) the easy accessability to financial services at the workplace, where many credit unions have their offices and/or representatives; (ii) the convenience of integrating paychecks with automatic deposit or savings plans, or with automatic loan repayment schedules; (iii) the security of conducting financial dealings with peers and co-workers; and (iv) a preference for participating in a cooperative association rather than an investor-owned institution governed by the profit motive.

Thus, the lower court's interpretation would adversely affect not only a disproportionately large number of individuals among the group the Act was intended to benefit, but it would also affect at least some of those individuals in a disproportionately adverse manner.

For all these reasons, small employers strongly support petitioners, and urge the Court to reverse the lower court's restrictive definition of the field of membership requirement.

B. The National Cooperative Business Association and Many of Its Members Would Be Adversely Affected By the Lower Court's Holding.

NCBA as an association would be directly and adversely affected should the decision of the court of appeals not be reversed because we offer our employees membership in the Agriculture Federal Credit Union (a credit union created for employees of the U.S. Department of Agriculture). An adverse ruling in this case could result in a subsequent order that would prohibit new employees from joining our credit union, or that might even force us to drop our participation in the Agriculture

FCU, which would deprive our employees of the opportunity to belong to a credit union, because we simply do not have enough employees to create our own credit union.

Likewise, many of our member organizations have become sponsors of existing credit unions that have expanded their membership under the policies set forth by the National Credit Union Administration since 1982. Breaking up those credit unions would have severe economic impact on their current members and/or employees who utilize the credit union and would deprive millions of individuals of the opportunity to join a credit union. Cooperatives and cooperative organizations that cannot create their own credit unions tend to be smaller and composed of individuals who have greater economic need for the services of a credit union. In fact, access to a credit union can be for many such cooperative members their sole source of financing other than wages.

The Congress reflects the will of the American people when it passes legislation that promotes the development of cooperatives and credit unions. A 1994 national Gallup poll[11] with an error range of plus or minus 2.3% demonstrates the public's preference. Nearly two-thirds of study participants indicated they were "somewhat" or "much more likely" to use retailers (64%), purchase food products (65%), or use credit unions (63%) if they knew they were cooperatives. Sixty-two percent "somewhat" or "strongly agree" that cooperatives "have the best interests of the customer in mind when conducting their business," while only 34% said the same thing about non-cooperative businesses.

Early this year, NCBA mailed to its 225 active member organizations a voluntary reply questionnaire regarding their

[11] *Awareness and Image of Business Cooperatives: A Survey of the American Public*, prepared by The Gallup Organization; July, 1994.

membership in credit unions. Ninety percent indicated they are affiliated with a credit union. Only 48% indicated they were the original common bond of association of the credit union. Thus, over half of those who responded would be negatively impacted by a decision that they could no longer be members because they did not share the original common bond of the credit union. Others could be impacted indirectly if they were forced to divest their credit union of a portion of their membership and the assets those members bring to the credit union.

The consequences of a decision requiring credit unions to break up and banning credit unions from receiving new groups of members into their field of membership would be antithetical to the intent of Congress in passing the Federal Credit Union Act (FCUA) and would limit the ability of Americans to join credit unions. Under such a narrow reading of the FCUA, employees of small organizations such as the National Cooperative Business Association would be denied the opportunity to be members of a credit union, because there aren't enough employees to make a credit union economically viable. The same would be true of many of our members for the same reason.

The wording of the FCUA is not restrictive, in keeping with the intent of the act, which was to foster the creation of credit unions in order to make them more universally available to consumers. Likewise, it was a reasonable and prudent decision on the part of the National Credit Union Administration (NCUA) in 1982 to interpret the act in a way that would ensure the financial viability of credit unions in an era of extreme economic stress for American financial institutions.

Neither "a common bond of occupation or association" nor "a well-defined neighborhood, community or rural district" can

be held to mean the same thing in 1995 as they did in 1934. Bonds of occupation or association are vastly different in an era of international business where employees work out of their homes and communications and even financial payments are instantaneously transferred on a global communications network. NCUA's decision demonstrated common sense befitting the state of the nation in the 1980's by interpreting the "common bond" language in a way that would continue to foster the well-being of credit unions. Without that interpretation, tens of millions of Americans who have access to credit unions would be denied such access. And countless credit unions would have found their economic well-being threatened. In the intervening 14 years, Congress has not acted to indicate in any way that NCUA was incorrect in its actions.

The Congress demonstrated its continuing commitment to the beneficial impact of cooperative organizations like credit unions when it passed legislation creating the National Cooperative Bank four years before NCUA's action in 1982. "The Congress finds that user-owned cooperatives are a proven method for broadening ownership and control of the economic organizations, increasing the number of market participants, narrowing price spreads, raising the quality of goods and services available to their membership, and building bridges between producers and consumers, and their members and patrons."[12] It's worth noting that again, just as it did when it passed the FCUA, the Congress in this case was passing legislation to provide access to credit to sectors of our economy that commercial banks would not finance.

Credit unions serve those purposes within the financial community. In bringing this suit, bankers demonstrated their desire to maintain their dominance of the financial markets by

[12] 12 U.S.C. § 3001.

insisting on a narrow interpretation of *field of membership* in a way that would frustrate the intent of the FCUA. Bank-held assets in this country are more than sixteen times greater than the assets of credit unions. Over 93 percent of the savings and deposits held by banks and credit unions in the country are held by banks. And yet, bankers would use a narrow definition of the FCUA to frustrate the stated goals of that act.

For all of these reasons, the cooperative members of NCBA strongly support petitioners, and urge the Court to reverse the lower court's restrictive definition of the field of membership requirement.

C. If Upheld, The Court of Appeals' Decision Will Jeopardize The Ability of Over 100,000 College Students, Each Year, To Access Reasonably Priced Financial Services Provided By Student Credit Unions.

CCUC believes that the court of appeals erred in failing to defer to the National Credit Union Administration's ("NCUA's") reasonable interpretation of the Federal Credit Union Act's "common bond" provision, 12 U.S.C. §1759. CCUC urges the Court to uphold NCUA's well-established Interpretive Ruling and Policy Statements ("IRPS")[13] that permitted credit unions to preserve their financial stability through diversification of their memberships. CCUC also wishes to apprise the Court of the practical effect that affirming the lower court's ruling would have on college students and student credit unions nationwide.

[13] *See* Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16,775 (1982); IRPS 82-3, 47 Fed. Reg. 26,808 (1982); IRPS 89-1, 54 Fed. Reg. 31,168 (1989); IRPS 94-1, 59 Fed. Reg. 29,066 (1994), *as amended by* IRPS 96-1, 61 Fed. Reg. 11,721 (1996); *see also* 12 C.F.R. § 701.1 (1996).

The term "student credit union" encompasses student-run cooperative financial institutions whose primary field of membership includes students and alumni of a college or university. The term also includes any credit union that added students of a college or university to its field of membership pursuant to NCUA's interpretation of the "common bond" provision of the Federal Credit Union Act. See IRPS 89-1, 54 Fed. Reg. at 31176. Many of these credit unions maintain an on-campus branch which is run by the students of the college or university being served.[14]

College students are considered by NCUA to be a group with little to no income.[15] Nonetheless, the financial services demanded by students such as ATMs, ATM cards and credit cards are technologically advanced and costly to provide. Students at some colleges and universities have been able to harness the resources to charter their own federal credit union and provide such high-cost services to their members. However, for the vast majority of college and university students, the stringent chartering requirements of NCUA and the set-up costs for providing such technologically sophisticated services are prohibitive.

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[14] There is no comparable example to this dynamic, service and education-oriented financial institution among local or national banks. At student credit unions nationwide, students are afforded the opportunity to own and operate their own financial institution and to vote at their credit union's annual meeting to elect their credit union's volunteer board of directors.

[15] The term "low-income member" includes those members of a credit union that are enrolled as full-time or part-time students in a college, university, high school or vocational school. *See* 12 C.F.R. §701.32(d)(2)(ii). A credit union that serves predominantly low-income members may receive a low-income designation from NCUA allowing the credit union to receive nonmember deposits. *See* 12 C.F.R. §701.32(d)(1).

NCUA's interpretation of the "common bond" provision of the Federal Credit Union Act has afforded students access to reasonably-priced financial services through on-campus credit union branches without the need to charter their own credit union. Additionally, NCUA's interpretation provided students with an alternative to the substantially higher bank fees and charges associated with the services most used by students. Finally, NCUA's interpretation of the "common bond" provision of the Federal Credit Union Act has allowed credit unions to maintain their economic viability by diversifying their membership and by balancing services to borrowers (e.g., students) and savers (e.g., older members).

If the court of appeals' decision is upheld, credit unions which have added student groups to their field of membership will be prohibited from adding new student members. Incoming college and university freshmen as well as potential undergraduate credit union members will not be able to join these credit unions because the decision prohibits a credit union from adding a group of college students to its field of membership if the group does not share the credit union's original common bond. This means that in excess of 100,000 students each fall[16] will be denied access to the financial services offered by student-run branch credit unions. The lower court's ruling will also force student-run branches to close due to the inability of the credit union to add new student members and the financial hardship of maintaining an on-campus branch whose use will dwindle with each successive year.

In addition, the court of appeals' decision will have a devastating impact on the availability of credit union services to those campuses that cannot harness the financial resources

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[16] This figure is based on the current enrollment figures for the colleges and universities cited in footnote 4 divided by four (4).

to build a stand-alone student credit union. The costs to charter a credit union and provide the services demanded by students are prohibitive for the majority of college and university students. If the court of appeals' decision is allowed to stand, students will be relegated to conducting their financial transactions exclusively at banks.

Effectively, the lower court's ruling results in the elimination of students' choice between cooperative credit and traditional, fee-riddled bank services. While students can certainly open accounts with banks, such accounts come at a very dear price. High minimum balance requirements, high fees and stringent credit requirements at banks force a group with little to no income to pay a great deal just to establish a credit history.

A recent comparison between account terms and fees charged by local banks and The Credit Union for Berkeley Students ("CUBS")[17], manifests the extent to which students are subject to excessive bank fees and rates. The comparison showed the following:

- CUBS charges no fees for use of a CUBS issued ATM card at another financial institution's ATM. In contrast, local banks such as Wells Fargo Bank and Bank of America charge up to $2.00 to use their ATM cards at other financial institutions' ATMs. Additionally, these banks impose a surcharge of up to $2.00 for access to their respective ATMs with cards not issued by them.

[17] This information was collected by the Credit Union for Berkeley Students as of October, 1996.

- Wells Fargo Bank and Bank of America charge $8.50 monthly on regular checking accounts.[18] Both banks waive the fee with a $1,000.00 minimum checking account balance or with a combined checking and savings account balance of $3,000.00. In stark contrast, CUBS charges a $4.00 monthly student checking account fee which is waived with a $750.00 minimum checking account balance.

- CUBS' VISA card has no annual or cash advance fee, an annual percentage rate of 15% and a late payment fee of $7.00. Wells Fargo Bank's VISA Card has an $18.00 annual fee (waived the first year), a 2% cash advance fee, an annual percentage rate of 19.8% and a late payment fee of $15.00. Bank of America's VISA card has no annual fee but does have a 2% cash advance fee, a 17.75% annual percentage rate and a $15.00 late fee.

- Wells Fargo Bank makes unsecured personal loans from $2,000.00 to $25,000.00 at an annual percentage rate of 19.25%. Bank of America makes such loans from $2,500.00 to $10,000.00 at an annual percentage rate of $19.50%. CUBS makes such loans up to $25,000.00 at an annual percentage rate of 13-15%.

The differences in these fees, rates and terms are crucial to students who live on low income but who require financial services to survive and to establish a credit history.

[18] Other accounts may be offered by these banks which are student oriented; however, the regular checking accounts at both institutions were chosen for the comparison because they most resemble the CUBS checking account.

The court of appeals' decision obliterates the ability of students to choose between reasonably-priced cooperative credit and traditional, high-cost bank services. Moreover, if upheld, the decision will force many on-campus credit union branches to close, since the credit unions could no longer add new student members. Hundreds of thousands of students would be barred from credit union access due to these branch closings and due to the prohibitive cost of setting up their own credit union. CCUC believes that the economic and educational benefits provided to student members of college student credit unions are the direct result of NCUA's long-standing interpretation of the "common bond" provision of the Federal Credit Union Act. CCUC urges the Court to uphold NCUA's interpretation of the Federal Credit Union Act in the interests of college students nationwide who rely on credit union services.

D. Protecting the Public Interest Requires Consideration of the Concerns of Real People: The Employees of ABC's Members.

ABC urges the Court to reverse the decision of the Court of Appeals for failing to defer to the NCUA's interpretation of the "common bond" requirement of the Federal Credit Union Act. The NCUA's interpretation is consistent with both the plain language and the stated purpose of the statute. Moreover, that interpretation accurately reflects the balance that Congress intended between the accessibility of banking and credit union services.

The greatest impact of the flawed decision of the Court of Appeals will be felt by the individual depositors, the small "shareholders" in credit unions, who must decide where to put their retirement money, or their college funds, or their health care nest egg, and where to borrow enough money to buy a used car or their first home. ABC sponsors one of the largest

credit unions in the country, the IR Federal Credit Union, with approximately 860 separate employer groups of ABC member firms. Changes in employment are frequent in the construction industry, with workers commonly hired by more than one employer each year. As an employee leaves one ABC member-firm employer and is hired by another, the employee can retain his membership in this one credit union serving both groups of employees.

If having more than one employer group in a credit union is unlawful, the IR Federal Credit Union will necessarily be disbanded, and many of its members will have no other place to save or to borrow. The stability, convenience and affordability of the financial services offered to these workers will be destroyed.

Credit union services could continue to be available to these workers if each employer sponsors its own separate credit union. But this is more dream than reality. Most employer groups now served by the IR Federal Credit Union would not be large enough, 500 employees according to the NCUA, to support a sustainable cost-effective credit union operation. The vast majority of ABC members have fewer than 500 (actually fewer than 50) employees. Rational employers will not make the investment needed to establish a credit union to serve transient workers if the credit union is doomed to fail.

Moreover, even if many employers did establish separate credit unions, instead of having convenient access to the same credit union with each move from one ABC member firm to another, workers would be forced to establish a new relationship with each new employer's credit union to obtain access to such affordable financial services. In light of the frequency of changes of employment typical in the construction industry, the fluctuations in membership that accompanied the cycles of employment would be devastating to the viability of

credit union operations. Even more important, though, few workers would undertake the effort needed repeatedly with each move to transfer their accounts or to become known to managers of a new credit union. Instead, most workers likely will just drop their credit union membership.

The banks apparently hope that the prospect of such constant interruption in these workers' financial services relationships will force each worker to abandon his relationship with credit unions and begin instead a relationship with a bank. But that relationship either will become more distant with each move, or will be with a financial institution large enough to provide services in every community to which the worker moves. In either case, the financial services available to the worker will become both less convenient and less affordable than those now offered through the credit union sponsored by ABC.

Workers who move about the country will become strangers to a "home" financial institution. Favorable credit decisions will become harder to obtain, as each worker loses contact with the lending officers in the worker's "home" branch. Checks written by the worker will be drawn on an "out-of-state" institution and will be that much harder to cash or offer in payment. Alternatively, preserving a relationship with a bank large enough to serve every community to which the worker moves will only lessen the inconvenience of obtaining such services -- it is unlikely these banking services will be available in the workplace. Moreover, for these workers of small means, the fees charged by such large banking institutions are prohibitive.

If the order below is not reversed, decisions of great personal import to these individual workers and their families will continue to be adversely and improperly affected. These workers will not simply turn to banks to fulfill their needs.

Instead, they will not save their money; they will not buy a new home. To them, such financial services will effectively become unavailable. For these reasons, ABC and the builders and contractors it represents ask the Court to reverse the decision of the Court of Appeals and restore public confidence that these workers will have access to the convenient and affordable financial services that Congress intended.

CONCLUSION

For all the reasons stated above and in the briefs submitted by petitioners, the Court should hold that the Court of Appeals' decision imposing a restrictive reading on the common bond requirement of the FCUA is contrary to the plain meaning of the Act as well as its broad and salutary purposes, and must be reversed.

Respectfully submitted,

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Robert Orr-Sysco
One Hermitage Plaza
P.O. Box 305137
Nashville, Tennessee 37209

Acme Mechanical
Contractors, Inc.
612 Volunteer Parkway
Manchester, Tennessee
37355

Amprite Electric
Company, Inc.
929 Fifth Avenue South
Nashville, Tennessee 37203

Total Graphics, Inc.
105 West High Street
Manchester, Tennessee
37255

Christian Manufacturing, Inc.
1711 Fratebarker
Austin, Texas 78741

JTW Enterprises, Inc.
336 S. Congress
Austin, Texas 78704

Texas Insurance
Organization
2801 South I.H. 35
Austin, Texas 78741

Taylor Security Systems
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Pontiac Coffee Break, Inc.
2265 Dixie Highway
Waterford, Michigan 48328

Pontiac Graphics
605 Oakland Avenue
Pontiac Michigan 48342

Metro Aircraft Instruments
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Waterford, Michigan 48327

Gaukler Storage Company
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Pontiac, Michigan 48341

World Credit, Inc.
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Association of Realtors
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Farmington, Michigan 48335

Heffernan Petersen Insurance
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Walnut Creek, California 94596

M. Bumgarner, Inc.
1175 Greenville Road
Livermore, California 94450

Pacific Coast Mortgage
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94583

Alliance Leasing
Corporation
4030 Commerce Park
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Marietta, Georgia 30060

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In The

Supreme Court of the United States

October Term, 1996

NATIONAL CREDIT UNION ADMINISTRATION,

Petitioner,

-and-

AT&T FAMILY FEDERAL CREDIT UNION and CREDIT UNION NATIONAL ASSOCIATION, INC.,

Petitioners,

vs.

FIRST NATIONAL BANK & TRUST CO., *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CALIFORNIA CREDIT UNION LEAGUE IN SUPPORT OF PETITIONERS

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APPENDIX

Appendix A — FDIC Documentation 1a

Appendix B — *Bankers News* Article 5a

CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief by *amicus curiae*.[1]

STATEMENT OF INTEREST OF THE CALIFORNIA CREDIT UNION LEAGUE

The California Credit Union League ("California League") is a nonprofit trade association representing the interests of 575 federal credit unions in the states of California and Nevada, comprised of over 5,391,590 members. The California League has represented federal credit unions in California since 1934.

Federal credit unions are nonprofit cooperative associations of individuals organized under the Federal Credit Union Act (the "FCUA" or "Act") "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C. § 1752. Credit unions are formed by groups with common interests joining to pool their financial resources and thereby promote savings and provide reasonable rates of credit to their members. The majority of federal credit unions represented by the League consist of more than one employer group, and some have more than 400 separate employer groups. Congress encouraged the success of the credit union movement in order to bring financial services to people who were unable to obtain such services elsewhere and to foster the development of a system of financial cooperatives that would serve as a valuable alternative to the traditional for-profit banking system. Likewise, Congress created the National Credit Union Administration ("NCUA")

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1. The consents have been filed with the Clerk of this Court. This brief was authored by the *amicus* and counsel listed on the front cover hereof, and was not authored in whole or in part by counsel for a party. No one other than *amicus* has made any monetary contributions to the preparation or submission of this brief.

as the federal agency charged with administration of the Federal Credit Union Act to ensure that these statutory purposes were accomplished, to ensure the safety and soundness of federal credit unions as an alternative credit system, and for the protection of credit union members.

Credit unions are organizations of people, not money. They are fundamentally different from other financial institutions. By definition, and as required by the Federal Credit Union Act, federal credit unions are nonprofit, member-owned and operated cooperative associations. By statutory requirement (as well as philosophical commitment), credit unions are democratically controlled with one vote for each member, regardless of the number of shares held by the member. Growth among credit unions is not for the purpose of greater profit for distant stockholders. Rather, growth for credit unions means first, continued viability in a heavily-regulated financial institution world, and second, more and better service for the individual member/owners who exercised the choice to participate in economic democracy.

The California League, then, is unusual among trade associations in that its true constituents are individual credit union members who have joined together in cooperative associations, rather than businesses. In a time when the nation as a whole is moving towards a model of greater self-reliance and nongovernmental mutual aid, credit unions provide an exemplary model of how citizens can join together to provide a high level of service for each other. The California League believes that a full understanding of the fundamental differences between credit unions and other financial institutions as developed since the FCUA's enactment in 1934 is a necessary background for an appropriate legal ruling by this Court. It is therefore on behalf of its 5,391,590 federal credit union members that the California League is interested in this case and submits this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Credit unions are "democratically controlled, cooperative, nonprofit societ[ies] organized for the purpose of encouraging thrift and self-reliance among [their] members by creating a source of credit at a fair and reasonable rate of interest in order to improve the economic and social condition of [their] members." *La Caisse Populaire St. Marie v. United States*, 563 F.2d 505, 509 (1st Cir. 1977); *see* 12 U.S.C. § 1752(1). Credit unions are thus distinguished from other types of financial institutions by their cooperatively-owned, nonprofit nature and the statutorily mandated democratic control among member/owners (one vote per member, regardless of number of shares), which ensures a voice in the cooperative for small depositors or borrowers. In short, where banks and thrifts enter commercial relationships with their customers to generate profit, credit union members have a cooperative relationship whereby they provide financial services for their mutual benefit at no profit. Also unlike other financial institutions, a credit union does not serve the general public, but "members" (co-owners) of the credit union drawn from a particular, specified "field of membership." A credit union's field of membership consists of groups with common interests, or a "common bond."

Congress enacted the Federal Credit Union Act of 1934 to create and nurture a national credit union system. In the wake of the credit crash accompanying the Great Depression, Congress intended to create an alternative credit system to stabilize credit and economic conditions to promote the national public interest. This is plain and express in the terms of the statute itself:

> An Act to establish a Federal Credit Union System, to establish a further market for securities of the United States and to make more available to people of small means

> credit for provident purposes through a national system of cooperative credit, thereby helping *to stabilize the credit structure of the United States.*

The Federal Credit Union Act of 1934, Pub. L. 73-467, 48 Stat. 1216 codified at 12 U.S.C. § 1751 (emphasis added).

Congress' vision of a federal credit union system which provides a safe and sound alternative to other types of financial institutions so as to have a diversified credit finance structure in the United States has been (and continues to be) fulfilled. For example, in the wake of the savings and loan bailouts of the 1980s, Congress required its General Accounting Office ("GAO") to conduct a comprehensive study of the federal credit union system pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). Indeed, Congress ordered the GAO to conduct such a comprehensive study of all federally regulated financial institutions. The GAO's findings are unambiguous:

> The condition of today's federally insured credit unions is better than that of banks and thrifts. . . . [The National Credit Union Share Insurance Fund] NCUSIF reported equity of $1.25 for every $100 in insured accounts, as of December 31, 1990. GAO's preliminary estimate is that the Bank Insurance Fund's equity was no higher than $.26 per $100 in insured deposits as of that date.

GAO, Report to the Congress, *CREDIT UNIONS: Reforms for Ensuring Future Soundness*, 3 (1991).

The achievement of the current soundness of the federal credit union system was neither accidental nor automatic. Not

surprisingly, given the dramatic changes in the United States economy since 1934 and the natural (and expected) maturation process, credit unions have evolved from a nascent social movement to a mature system providing a variety of financial services to cooperative members on a no-profit basis. This is precisely what Congress wanted and expected when it enacted the 1934 Act. Yet this gradual development of the federal credit union system to the most safe and sound of the existing financial institutions did not occur *ex machina* once Congress anointed it in 1934. To the contrary, the advancement of the federal credit union system to its present condition of safety and soundness was cultivated by both a concerned and committed Congress and responsible agency oversight. Indeed, the ups and downs of the nation's economic conditions required Congress to persistently adjust and refine its legislation governing all financial institutions. With respect to amendments of the FCUA, Congress has consistently expanded the scope of financial services which federal credit unions are authorized to provide.

The 1934 Act contained the following "common bond" provision:

> Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community or rural district.

12 U.S.C. § 1759. Congress did not define "common bond," nor has it modified the language of the common bond provision. Instead, Congress expressly entrusted to the NCUA the authority to interpret, develop and apply the provision as evolving economic and social conditions require. *See* 12 U.S.C. § 1754.

As part of its continuing efforts to "ensure the continued

availability of credit union service" and to ensure the soundness of the credit union system in light of the developing and maturing credit union system, the NCUA in 1982 adopted a policy permitting the establishment of credit unions consisting of "multiple occupational groups." Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). The policy permitted federal credit unions to amend their charters to accept employees from different occupational groups that do not share the same ownership, thus expanding the option to choose between different types of financial institutions for millions of citizens who were previously ineligible for federal credit union membership because they worked for a small or medium-sized employer.

Apparently precisely because Congress' vision of the federal credit union system as a viable alternate credit system has been achieved, First National Bank and Trust Company, Lexington State Bank, Randolph Bank and Trust Company, Bankers Trust of North Carolina, and American Bankers Association (the "Banks") have sued NCUA over its interpretation of the "common bond" provision of the Act.[2] The thrust of the Banks' lawsuit is that the NCUA's interpretation of this provision, to allow a single credit union to have members from more than one employer group, is contrary to the language of the FCUA and therefore unlawful. Both the lawsuit generally, and the Court of Appeals' decision in particular, misapprehend the nature and history of credit unions and the "common bond" principle as they pertain to congressional enactment of the FCUA and

2. The Banks concede — as they must — that the banking industry was not an intended beneficiary of the Federal Credit Union Act. Instead they claim standing through an asserted zone-of-interest analysis based on "competition." However, the Banks, representing assets of more than $5.5 trillion dollars, are steadily achieving greater and greater profits each year, realizing record profits of $52.4 billion in 1996, the fifth consecutive year profits continued to reach new heights. In contrast, the NCUA regulates credit union assets of approximately $200 billion, over 27 times less than the assets of the Banks. A true copy of FDIC documentation is attached as Appendix A.

empowerment of the NCUA.[3] As set forth more fully below, the history of the FCUA and the federal credit union system it generated and maintains demonstrates that Congress did not intend that the practical implementation of the term common bond remain unchanged despite the dynamic (and intended) growth of the federal credit union system. Accordingly, NCUA's reasonable interpretation of the provision, as the agency charged by Congress with enforcing the FCUA, should be upheld and the D.C. Circuit's judgment reversed.

ARGUMENT

I.

THE HISTORY OF THE FEDERAL CREDIT UNION ACT DEMONSTRATES CONGRESS' INTENT THAT A FEDERAL CREDIT UNION SYSTEM BE NOT ONLY ESTABLISHED BUT ALSO MAINTAINED AS AN ONGOING NONPROFIT, COOPERATIVE CREDIT ALTERNATIVE TO OTHER FINANCIAL INSTITUTIONS.

A. The Beginnings Of The Credit Union Movement.

Cooperative credit associations had their origins in mid-19th Century Europe. In Germany, Hermann Schulze-Delitzsch founded several cooperative credit societies. Schulze-Delitzsch emphasized that the collective liability incurred by members would motivate these societies to include only members deemed to be worthy of credit. Most of Schulze-Delitzsch's efforts were concentrated in urban areas and the size of his newly founded

3. The California League strongly believes that the Banks lack standing to sue the NCUA both because there is no injury in fact emanating from the statute challenged and no prudential standing. However, the scope of this brief is limited to the history of the federal credit union system and distinctions between credit unions and other financial institutions.

"people's banks" was often quite large. In the late 1800s, interest in cooperative credit associations began to grow in Canada and its first cooperative was organized there in 1901. J. C. Moody & G. C. Fite, *Credit Union Movement: Origins and Development, 1850 to 1980*, 3-25 (2d Ed. 1984).

In 1909, the first credit union in the United States, St. Mary's Parish Credit Union, was organized in New Hampshire. Just weeks later, Massachusetts passed the first state law authorizing state credit union charters, defining credit unions as cooperative associations "formed for the purpose of promoting thrift among [their] members." The field of membership of some early credit unions was quite broad. Indeed, St. Mary's Parish Credit Union essentially allowed anyone in the surrounding community to become a member. Although early state laws outlined the cooperative and democratic spirit of credit union philosophy, few restrictions, if any, were placed on membership. A. Burger & T. Dacin, *Field of Membership: An Evolving Concept*, 5 (1991) (study prepared by the Center for Credit Union Research and the Filene Research Institute).[4]

During the early twentieth century, credit unions grew under state charters. By 1934, there were approximately 2,500 credit unions in 38 states and Washington D.C. During this early period however, credit unions were not chartered or administered by the federal government.

B. Enactment Of The Federal Credit Union Act To Establish An Alternative National Credit System.

In 1934, Congress established a nationwide credit union system with the enactment of the Federal Credit Union Act. Pub.

4. Notably, as Burger and Dacin observe, "many of the early state credit union laws did not explicitly address the issue of common bond. It was simply left to the credit union to prescribe the qualifications, if any, for membership." *Id.* at 5.

L. No. 73-467, 48 Stat. 1216 (1934). Congress passed the Act in the wake of the collapse of the nation's credit markets during the Great Depression as part of the New Deal strategy to bring stability and security to financial institutions, as well as to the national economy more generally. At that time, funds available for loans became scarce and interest rates rose to high levels. *See* S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). These high interest rates sharply reduced or eliminated the ability of individuals "of small means" to purchase goods on credit. *Id.* at 1. Prior to the passage of the bill allowing credit union organization in Washington D.C., government employees could only get credit through loan sharks. R. Bergengren, *Crusade*, 185 (1973). This was necessary because banks at that time did not lend to consumers. *Id.* at 26.

Congress determined that it was in the national public interest to "establish a Federal Credit Union System" that would "bring normal-credit resources on a cooperative basis to the masses of the people whose buying power is now so often dissipated in high-rate interest charges." S. Rep. No. 555, 73d Cong., 2d Sess. at 1; H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Congress believed that a national credit union system would benefit small borrowers by providing them with an alternative to banks (who often would not lend small amounts of money to persons who could not meet the collateral requirements of the bank) and "loan sharks" (who charged usurious rates). *See, e.g.*, 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard); *id.* at 12224 (remarks of Rep. Luce).

Likewise, by permitting members "with their own money and under their own management to take care of their own short-term credit problems," credit unions were intended to improve substantially the terms on which small borrowers could obtain credit. S. Rep. No. 555, at 2. The buying power of the public would thus be directed toward the recovery of the nation's

economy, instead of being consumed by excessive interest charges. *Id.* at 1; H.R. Rep. No. 2021, at 1-2.

Congress was particularly impressed with the stability and financial soundness demonstrated by the credit union form of financial institution. As the Senate Report noted, in contrast to the upheaval the Depression caused the nation's banks, in the "38 States and in the District of Columbia" where credit unions operated, there had been "no involuntary liquidations" and credit unions had compiled an "exceptional . . . record for honest management." S. Rep. No. 555, at 2. *See also* 78 Cong. Rec. 7259 (1934) (remarks of Sen. Sheppard). It was from this social and economic context that Congress determined it to be in the national interest to establish a federal credit union system as an alternative credit system. Enacting the FCUA at this early time in the history of credit unions in the United States, Congress did not merely authorize the chartering of federal credit unions, but also affirmatively committed to the positive establishment and maintenance of an entire system of nonprofit federal credit unions as an alternative to profit-driven banks. In short, "Congress' general purpose was to encourage the proliferation of credit unions. . . ." *First Nat'l Bank & Trust Company v. National Credit Union Administration*, 988 F.2d 1272, 1275 (D.C. Cir. 1993).

Congress ensured that federal credit unions would be an alternative to for-profit banking through the structure it mandated for federal credit unions:

(1) Federal credit unions are funded by purchases of shares by *members only*, each member is an owner with the right to vote on credit union policies;

(2) Each member has only one vote, regardless of the number of shares owned by the member thereby ensuring the democratic nature and function of the federal credit union;

(3) Membership in a federal credit union is limited to "groups," the members of which share a "common bond" of occupation or association with each other or are located in a well-defined neighborhood, community or rural district;

(4) Overall, management of the credit union lies with volunteers; only one member of the board of directors is permitted to be compensated;

(5) Loans are made *exclusively* to members.

In addition, at the outset, the FCUA limited federal credit unions to making only small consumer loans.

This structure makes the distinctions with the for-profit banks and thrifts eminently plain. Whereas other financial institutions are capitalized by (and responsible to) *outside* stockholders, federal credit unions are by statute capitalized exclusively by member deposits. Whereas other financial institutions can sell services to the public at large, federal credit unions may provide financial services only to their own members. Whereas any bank or thrift director may be paid, only one federal credit union director may be compensated. And bottom line: banks and thrifts are driven by the desire for increasing profits;[5] federal credit unions seek to provide better and more reasonably priced services for the mutual benefit of the members.

5. A recent article from the American Bankers' Association newspaper, *Bankers News*, makes express the bankers' subordination of services to profit. In "Identifying and Wooing Your Best Customers," the ABA states candidly: " 'Between 50-60 percent of your customers are a burden; they're unprofitable. They're absorbing costs and they're not providing enough revenue to offset that cost,' says Hudson [EVP, First Security Bank, Salt Lake City], who advocates finding ways to develop their potential profitability." *Bankers News*, Volume 5, Issue 8, April 22, 1997. A true and correct copy of the article is attached hereto as Appendix B.

C. Congressional Expansion Of The Federal Credit Union System Since 1934 Demonstrates Its Intent To Maintain Federal Credit Unions As A Sound And Viable Alternative To Banks And Thrifts.

Since the 1934 enactment, Congress has responded to the evolving economic situation in the nation and consistently expanded the powers of federal credit unions through periodic amendments to the Act. To facilitate the growth and stability of the credit union system, Congress has given credit unions increasingly broad powers, and has repeatedly enacted legislation allowing them to offer additional services. In 1959, recognizing that some credit unions "hav[e] a large and continually increasing volume of loan activity," Congress authorized the appointment of loan officers, raised the unsecured loan limit from $400 to $1,000 and increased the maximum permissible loan maturity from 3 to 5 years. Pub. L. No. 86-354, 73 Stat. 628 (1959); H.R. Rep. No. 696, 86th Cong., 1st Sess. 55 (1959). In 1977, Congress expanded the lending authority of federal credit unions to permit credit unions additional powers in variable savings accounts, mortgage loans and consumer loans. Previously federal credit unions could offer only one type of savings account. Now they could offer variable rates and maturities for savings accounts and could offer share certificates (CDs). Also, in 1977, Congress authorized credit unions to make real estate loans with maturities of up to 30 years, to "allow credit unions to continue to be able to attract and retain the savings of their members." Pub. L. No. 95-22, 91 Stat. 49 (1977); H.R. Rep. No. 23, 95th Cong., 1st Sess. 7-9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110-132.

Congress made these changes, and other similar expansions of credit union powers and services, with the express intent that credit unions be able to offer needed services, to attract new members and to retain current members. When Congress increased the maximum maturity of secured loans from 5 to 10

years in 1968, it did so to "enable credit unions to compete more effectively in the home improvement field . . ." S. Rep. No. 1265, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2469, 2470.

In October 1970, after 36 years of operating without any federal deposit insurance, Congress again amended the Act and made credit unions the last type of depository financial institution to obtain federal deposit insurance. The National Credit Union Share Insurance Fund ("NCUSIF") was established as a revolving fund in the U.S. Treasury, under the management of the NCUA. Unlike the FDIC or FSLIC, the NCUSIF was launched without any start-up capital from the U.S. Treasury or Federal Reserve, but was funded entirely by member credit unions. All federally-chartered credit unions were required to become members of the fund and state chartered credit unions could apply for membership in the fund.

D. Congressional Deregulation Of Financial Institutions In The 1970's And 1980's.

In the late Seventies and early Eighties, Congress enacted sweeping statutes aimed at deregulating financial institutions. These acts included the Federal Credit Union Act of 1977, the Financial Institutions Regulatory and Interest Rate Control Act of 1978, the Depository Institutions Deregulation and Monetary Control Act of 1980 and the Garn-St. Germain Act of 1982.[6]

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6. It is a wonderment to the California League how, especially in light of these statutes which Congress specifically designed to promote competition between different types of financial institutions, the Banks can contend that they have suffered some kind of actual harm by the NCUA's interpretation of common bond. The Banks have access to the public at large; federal credit unions do not. Indeed, the competition the Banks must be concerned about is not head to head competition between a neighboring bank and credit union. Rather, it is the mere existence of the nonprofit credit union alternative that (Cont'd)

The major intent of this sweeping financial reform was to enhance competition among depository institutions. Bundt & Keating, "Depository Institution Competition In The Deregulated Environment: The Case of the Large Credit Union," 20 *Applied Economics*, 1333 (1988).

With deregulation, Congress enabled federal credit unions to provide more services which previously were only available from banks and thrifts. Nevertheless, Congress maintained the fundamental structure and distinctions of the federal credit union system: credit unions were still nonprofit cooperatives which served only their own members.

E. Administration Of The Federal Credit Union Act To Promote Congressional Intent Of Proliferation And Soundness Of Credit Unions.

Congress enacted the FCUA, in large part, to establish an alternative credit system to stabilize the credit and economic conditions in the nation. To attain this congressional end, the statute would need to be administered with this goal front and center. Congress' intent to ensure both the proliferation and soundness of the federal credit union system is reinforced in the history of its delegation of powers to administer and interpret the Act.

Upon enactment, Congress initially charged administration of the FCUA to the Federal Credit Union section of the Farm Credit Administration. In 1942, Congress amended the FCUA and transferred its administration to the Federal Deposit Insurance Corporation. Six years later, it was assigned to the

(Cont'd)
upsets the Banks, the existence of which stands between the Banks and a monopolistic financial services landscape. Yet it is precisely the ongoing nonprofit alternative that Congress intended to create with the enactment of the FCUA.

Bureau of Federal Credit Unions within the Social Security Agency, under the Department of Health Education and Welfare, where it remained until 1970.

In 1970, Congress enacted the National Credit Union Administration Act whereby it established the NCUA as an independent federal agency charged with the administration and interpretation of the FCUA. P.L. 91-206.[7] The Senate Report describing the need for the legislation creating the NCUA as the independent administrator is unambiguous:

> Since their existence, the supervision and regulation of Federal credit unions has been shifted from one Federal agency to another. The current regulatory authority is vested in a bureau which is part of a larger (and to a great extent nongermane) administration which is a part of a still larger department of the Federal Government.
>
> *The committee believes that Federal credit unions have become such a significant component of our society that they need and deserve a more responsive and independent regulatory agency.*
>
> . . .
>
> The committee believes that the Federal instrumentality charged with the regulation of Federal credit unions has a great responsibility and an opportunity to make real and substantial contributions to our society.

7. In 1978, Congress created a three-member board to manage the agency. *See* Pub. L. No. 95-630, 501, 92 Stat. 3680 (1978); 12 U.S.C. § 1752a.

S. Rep. No. 91-518, 91st Cong., 2d Sess., 1970, P.L. 91-206, *reprinted in* 1970 U.S.C.C.A.N. 2480 (emphasis added).

As part of its responsibility for administering the Act, Congress specifically delegated to the NCUA the power to "prescribe rules and regulations for the [Act's] administration," and to charter, examine and supervise federal credit unions. 12 U.S.C. § 1766; *see generally*, 12 U.S.C. §§ 1756, 1754, 1753. Congress believed that by establishing the NCUA as an independent agency, it would improve the office's ability to "provide more flexible and innovative [credit union] regulation." S. Rep. No. 91-518, 91st Cong., 2d Sess., 1970, *reprinted in* 1970 U.S.C.C.A.N. 2481. A vital and express component of the NCUA's legislative mandate is to administer the Act so as to ensure the stability of federal credit unions. This is both consistent with and indicative of Congress' original intent to establish a federal credit union system as an ongoing alternative financial institution system. Congress also directed the President to "make certain that those selected for positions on the Board of Governors [of the NCUA] will have a deep interest in credit unions." H.R. Rep. No. 331, 91st Cong., 1st Sess. 5 (1969).

In 1972, the NCUA's administrator, Herman Nickerson, noted that "the number of federal credit unions dropped in 1971 for the first peace time year on record." NCUA, *Trends In Chartering And In Operating Credit Unions*, 6 (1973). Pursuant to its charge to ensure the stability of federal credit unions and protect their members, the NCUA undertook a study to determine the reasons for the decrease. The study revealed that several factors caused the change: impact of federal share insurance, broadening of membership field, economic factors, emphasis toward assisting existing credit unions and the dearth of volunteer officials. *Id.* at 5-10. Speaking to the emphasis on assisting existing credit unions, the study noted:

> Several respondents felt that a primary factor behind recent chartering trends has been a changing emphasis by most State Leagues away from organizing new credit unions and toward assisting existing credit unions. Undoubtedly the shifting emphasis is partly due to the numerous problems encountered by the many small credit unions in the 1960's. Many League officials express the opinion that *very small or marginal credit unions offer inadequate services to their members, and therefore add little or nothing* to the credit union industry. It is felt that, in many instances, *current and future credit union members can be best served by more stable and established credit unions.* The goal of increased credit union membership and service has not been altered, but the expressed emphasis is now on expanding membership and services of the successful credit unions rather than on increasing the number of units.

Id. at 9 (emphasis added). In response to the NCUA study, one regional director stated:

> We believe that fewer credit unions will be chartered than were chartered in past years. However, those organized will cover a larger field of membership and provide service to more people. Also, many groups not presently served will be reached by amending the charters of existing credit unions. . . . The services rendered should surpass the services

> provided by many of the credit unions which service relatively small groups.

Id. at 47.

As the NCUA study demonstrates, the credit union movement was at a point around 1970 where, due to economies of scale, it was of greater benefit to individual members that credit unions grow through increasing their field of membership (and mergers) rather than through organizing new small credit unions which were unable to provide the substantial services allowed by larger membership and larger credit unions.

In 1982 the NCUA further developed its field of membership approach by adopting a policy which expressly permitted the establishment of credit unions consisting of "multiple occupational groups." Interpretive Ruling and Policy Statement ("IRPS") 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). The agency promulgated the policy in accordance with the provisions of the Administrative Procedure Act, after full opportunity for public comment. This policy permitted federal credit unions to amend their charters to accept employees from different occupational groups that do not share the same ownership, thus expanding the options to choose between different types of financial institutions for millions of citizens who were previously ineligible for federal credit union membership because they worked for a small or medium-sized employer. Subsequently, federal credit unions applied for amendments to their charters to add such additional employee groups consistent with this regulation and the language of the Act, under NCUA Chartering Manual Ch. 2 § I.

This evolution of the NCUA's policy was a considered and deliberate development of its administration of federal credit

unions, consistent with the statute[8] and required by conditions facing federal credit unions at the time. When the NCUA updated its policy in 1984, it specifically articulated the rationale for its 1982 decision to permit multiple group charters:

> The primary intent of the newly expanded field of membership policy and the essential basis for all changes in the policy since April 1982 is to provide credit union services to new groups — *to people who do not presently have credit union service available to them.*

49 Fed. Reg. at 467537 (IRPS 84-1) (emphasis added).

Despite the D.C. Circuit's statement below (Pet. App. A at 3), the NCUA's 1982 regulation expanding the definition of common bond was *not* an abrupt about-face from prior regulatory practices. To the contrary, as the federal credit union system developed and expanded in the years following 1934, the agency regularly adjusted field of membership requirements to correspond to existing needs as contemplated by the Act. For example, in 1967 NCUA's predecessor agency replaced its prior requirement that members be "extensively acquainted" with the

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8. The D.C. Circuit below held that the NCUA's interpretation was contrary to Congress' unambiguous intent. Yet this holding of lack of ambiguity is directly contrary to the findings and recommendations of Congress' own GAO:

> If common bond is important to ensuring the safety and soundness of credit unions and distinguishing them from other insured depository institutions, legislative guidance should be provided on the purpose and limits of the common bond and multiple group charters.

GAO, *CREDIT UNIONS* at 214.

new requirement that members "know" each other. And in 1969, the agency amended its regulations to permit federal credit unions to have a "once a member, always a member" policy. Then in 1972, NCUA issued a chartering manual which described "common bond" as:

> a characteristic prerequisite to the fulfillment of group objectives and when present among persons of related interests and purposes, these persons could be expected to effectively operate a credit union.

See GAO, *CREDIT UNIONS* at 217. A revised chartering manual was issued in 1980. It further loosened the definition of common bond:

> Common bond is defined as the sharing of some unifying factor or characteristics among persons which simultaneously links them together and distinguishes them from the general public.

Id at 218. In this new chartering manual, the NCUA added new standard language for all types of common bonds that again relaxed the definition of "common bond:"

> Field of membership includes spouses of people who died while eligible for membership, employees of credit unions, members of their immediate family, and organizations of such persons.

The NCUA's history of adjusting its regulations in accord with the statute to provide for ongoing stability and soundness in the credit union system demonstrates the Agency's adhering to congressional intent, rather than thwarting it.

II.

THE CREDIT UNION MOVEMENT DEVELOPED THE TERM "COMMON BOND" AS A PRINCIPLE FOR ORGANIZING CREDIT UNIONS AS VIABLE FINANCIAL INSTITUTIONS.

Congress did not coin the term "common bond" in the 1934 FCUA. Neither did it fix a single, set definition which it intended would remain unchanged throughout the development of the federal credit union system. *See generally,* 12 U.S.C. §§ 1751 *et seq.* To the contrary, the term was taken from the emerging credit union movement itself. Early leaders of the credit union movement in the United States identified a commonality of interest, or "common bond" as being a sound *basis* of credit union membership and organization. A. Burger & T. Dacin, *Field of Membership: An Evolving Concept,* 5 (1991)

Professors Burger and Dacin explain the economic function of the common bond principle:

> The common bond was a low cost way of delivering specific services to a specific segment of the financial market. Credit unions had a focused market — small loans to consumers. . . . [¶] Providing small consumer loans is very costly. The cost of originating the loan — credit checks, paper work, etc. and enforcing and collecting the loans is very high. It is expensive to collect valid financial information on the loan applicant, especially before the advent of central credit agencies. Collecting monthly payments incurs mailing and record keeping costs. Also, the costs of collecting bad loans is very high involving finding the individual

and related legal fees. In addition, the cost of processing of a $5,000 loan for a three-year period is generally the same as the fixed costs associated with originating a $200 loan for a three-month period. For example, collection and information costs were estimated at $62.12 or 53.1% on a $200 loan in the early 1970's. M. Flanery, *An Economic Evaluation of Credit Unions in the United States,* 61 (1974). Given these high costs, banks were not very interested in this business and credit unions found that their main competitors, especially in the urban industrial areas, were loan sharks.

> Credit unions were able to significantly reduce the costs associated with originating small consumer loans through the use of a common bond among the members and a restricted field of membership. For example, occupational credit unions had low-cost knowledge of the income, character, and job stability of potential borrowers. Peer pressure acted to reduce default rates, and credit unions took a more "personal" approach to working out loan difficulties with their members.[9] Close ties of lenders and borrowers, and boards of directors who understood the local economic conditions, the "character," and the financial position of

9. Loan losses for all federal credit unions amounted to 0.32% of the dollar amount of these loans compared to 0.43% for commercial banks and 2.38% for finance companies (5 year averages ended 1974). Peggy Brockschmidt "Credit Union Growth in Perspective," *Monthly Review* (February 1977).

> the borrower, made it economically feasible to provide these small loan services to individuals who would not otherwise have access to financial markets.
>
> . . .
>
> Organizing new credit unions was simply much easier around particular groupings. It was also more economically viable to found credit unions in industrial groupings where start-up costs were generally lower due to the presence of an established infrastructure and a ready supply of volunteers. A small credit union was easily managed by unpaid volunteers, who ran most of the credit unions. Data processing was by ledger, and the optimal size was seen by many early credit union founders to be under 500 members. . . .

Id. at 6-7.

In contrast, the federal credit union system is no longer in its "early days." To the contrary, it is now a mature, well developed credit system wherein growth through expansion of field of membership is consistent with and fulfills Congress' original intent to develop a sustainable alternative nonprofit credit system. There is nothing in the Act to suggest otherwise.

III.

FEDERAL CREDIT UNIONS CONTINUE TO OPERATE AS AN ALTERNATIVE, NONPROFIT SYSTEM OF CREDIT DISTINCT FROM OTHER FINANCIAL INSTITUTIONS AS ENVISIONED BY CONGRESS.

Congress designed the federal credit union system as an alternative credit system separate and apart from other federally regulated financial institutions. The impetus was twofold: (1) existing credit unions survived well the onslaughts of the Great Depression without the wholesale closures experienced by banks; and (2) credit unions were nonprofit institutions serving individuals of "small means" who were not being served by other financial institutions. These motivations and credit unions' distinctness as a financial institution remain today.

As a result of congressional deregulation of financial institutions in the 1970's and 1980's, different types of financial institutions provide increasingly similar types of *consumer* services.[10] Nevertheless, the need for the federal credit union system as initiated by the 1934 Act remains. Federal credit unions still provide financial services at a lower cost to the consumer than do banks and thrifts. Analysis of the Bank Rate Monitor dated April, 1996, reveals that credit unions had dramatically lower interest rates on consumer loans than did banks: for cars, banks charged an average of 9.14%, compared to 7.71% at credit unions, and credit card interest at banks averaged 18.18%, compared to 13.15% at credit unions. Credit unions offer greater savings incentives, as well, averaging .75% greater interest yield than banks. *Id.* The lower interest rates for

10. Although by deregulation Congress expanded federal credit union powers for consumer financial products, federal credit unions are still restricted to providing consumer services. Banks remain the primary institutions providing commercial financial services.

loans found in credit unions are not based upon a desire to "outcompete" the Banks, but are a natural byproduct of the nonprofit structure of the credit unions. Without stockholders to please, the credit unions set their rates based upon ability to cover expenses and pay interest back to their members. In addition, the FCUA requires that credit unions make loans for "provident and productive purposes." 12 U.S.C. § 1752. The Banks have no similar limitation or recommendation.

Safety and soundness issues also distinguish federal credit unions from banks and thrifts and embody the continued fulfillment of congressional intent. As determined by the congressional GAO, the condition of the federal credit union system is "better than that of banks and thrifts." GAO, *CREDIT UNIONS* at 3. In 1989, the insurance fund for thrifts went bankrupt, with a loss of approximately $200 billion. Similarly, the bank insurance fund had a negative net worth. Kane & Hendershott, *The Federal Deposit Insurance Fund That Didn't Put a Bite on U.S. Taxpayers*, 20 JOURNAL OF BANKING & FINANCE 1305, 1306 (1996). Conversely, the credit unions' insurance fund, NCUSIF, funded solely by member credit unions and managed by the NCUA, remained solvent, despite the fact that it, too, "was exposed to managerial turnover, unlucky economic events, a strong lobby, and financial deregulation." *Id.* at 1307. This success can be explained by the cooperative form of credit unions, which "lessens personal returns that can be captured by managers who successfully shift risks to NCUSIF" and reflects "difficulties managers face in diverting to themselves a sizeable share of the upside of the firm's winning bets." *Id.*

Further, NCUSIF is funded differently from the thrift and bank insurance funds:

> Establishing this fund of prepaid premiums aligns the incentives of bureaucrats,

> politicians, and credit unions to restrain NCUSIF loss exposure better than the pay-as-you-go systems used by the other two federal funds. Because the impact of individual institution failures on CUMIS premiums and NCUA assessments is averaged across surviving credit unions, credit-union managers have an incentive to alert private and federal monitors to instances of corrupt, incompetent, or highly speculative activity at other credit unions when they learn of them.

Id. at 1313. In sum, the cooperation runs deeper than just members of a single credit union — the entire federal credit union system collectively coinsures and is jointly responsible for the success of each credit union, because if one fails, the rest of them pay. The same clearly cannot be said to apply to for-profit institutions.

Finally, when a credit union requests an amendment to its charter to add a group, the reasons may include:

- Providing credit union access and service to an additional, clearly defined group of persons who desire to be served by the applicant credit union;

- Diversifying the membership base in order to withstand real or potential economic adversities;

- Expanding the membership base to facilitate *an improvement of service* to all members.

Chap. 2, "Reasons for Requesting an Amendment." (Emphasis added.) This evidences an intent to expand only when

specifically desired by the members of a potential group, to economically survive, or to better accommodate members — all permissible objects from the service-oriented, and financial stability goals of the 1934 Act. Further, the request for adding a group must indicate: "That at present the group does not have the availability of a credit union." *Id.* Again, these requirements illustrate only the furthering of Congress' original credit union goals: to make reasonably-accessible credit available to all groups who desire it — any other policy would frustrate these clearly-defined purposes of the FCUA. Expanding into areas previously unserved, when specifically requested to do so, cannot be construed as competition with banks, who are virtually unrestrained in their ability to solicit any customer residing anywhere. These two entirely different ways of extending credit are simply not comparable.

CONCLUSION

Both by its original enactment of the Federal Credit Union Act and by its subsequent amendments expanding the powers of federal credit unions, Congress has unambiguously demonstrated its commitment to maintaining the nonprofit federal credit union system as a consumer alternative to for-profit banks and thrifts. The GAO's 1991 Report To Congress heralding the federal credit union system as the most sound of the financial systems illustrates the responsible and effective administration of credit unions by the NCUA. The California League's constituents count among their members teachers, factory workers, firefighters, clerical workers, government employees; indeed, the entire gamut of working people. Patently there is nothing in the 1934 Act (or anywhere else in the record) to show that Congress sought to deprive any one of these groups the opportunity to choose to become a member of a federal credit union and avail itself of the benefits of nonprofit financial services. Insofar as nothing in either the 1934 Act or subsequent

amendments demonstrates a clear congressional intent to cripple credit unions by requiring the "common bond" provision be interpreted restrictively, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court should permit the NCUA's common bond regulation to stand and reverse the circuit court below.

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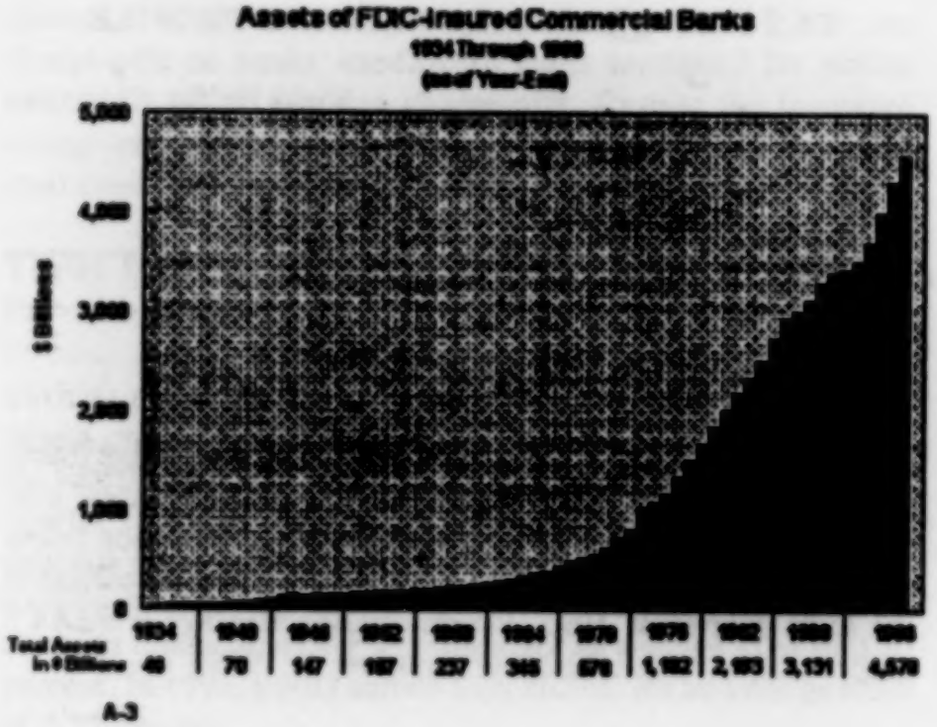
APPENDIX A — FDIC DOCUMENTATION



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Appendix A

THE ..IC QUARTERLY BANKING PROFILE

Ricki Helfer, Chairman

Graph Book — Fourth Quarter, 1996

Fourth Quarter Highlights

Fourth-Quarter Bank Earnings Total $13.7 Billion

Insured commercial banks earned $13.7 billion in the fourth quarter of 1996, the third-highest quarterly earnings total ever reported. The industry's net income was only $91 million below the all-time quarterly record amount of $13.8 billion, earned in the third quarter of 1995. Fourth-quarter earnings were 14.5 percent higher than in the fourth quarter of 1995.

Full-Year Earnings Set New Record For Fifth Consecutive Year

For all of 1996, insured commercial banks earned a record $52.4 billion, an increase of $3.6 billion (7.5 percent) over 1995. This is the first year that industry earnings have surpassed $50 billion. The average return on assets (ROA) was 1.9 percent, the second-highest annual level ever recorded, and only slightly below the all-time high of 1.20 percent, set in 1993.

Problems Increase In Consumer Loans, Decline In Other Categories

Higher charge-offs helped produce a decline in noncurrent loans (loans 90 days or more past due or in nonaccrual status) during 1996. Much of the increase in charge-offs was centered in

Appendix A

consumer loans, especially credit cards. For the full year, net charge-offs on banks' credit-card loans accounted for almost two-thirds of all net loan charge-offs. Despite the increased charge-off activity, noncurrent and delinquent (30-89 days past due) credit-card loans rose during 1996.

Thrift Industry Earnings Rebound From Net Loss In Previous Quarter

Savings institutions posted net earnings of $2.2 billion in the fourth quarter, an increase of $375 million (21 percent) over the fourth quarter of 1995. The higher earnings followed a third quarter in which a $3.5-billion special assessment on SAIF deposits combined with extraordinary losses to produce a $56-million net loss for the industry. For the full year, industry earnings totaled just over $7 billion, for an average ROA of 0.70 percent. In 1995, thrifts earned $7.6 billion, for an average ROA of 0.77 percent.

Six Insured Institution Failures Is Smallest Annual Total Since 1972

No insured commercial banks or thrifts failed in the fourth quarter. For all of 1996, there were six failures — one savings institution and five commercial banks. This is the fewest failed institutions since 1972, when five institutions — two FDIC-insured commercial banks and three FSLIC-insured savings institutions — failed. In 1995, there were eight insured institution failures — two savings institutions and six commercial banks.

Appendix A

Reserve Ratios For Both Insurance Funds Rise Slightly In Fourth Quarter

The reserve ratios for both the Bank Insurance Fund (BIF) and the Savings Association Insurance Fund (SAIF) increased modestly in the fourth quarter. The increases occurred despite lower insurance premium revenues, due to the combination of higher investment earnings and the absence of insurance losses. Both insurance funds met the minimum reserve ratio requirement of 1.25 percent of insured deposits the beginning of the fourth quarter, after the SAIF became fully capitalized on October 1.

APPENDIX B — *BANKERS NEWS* ARTICLE

IDENTIFYING AND WOOING YOUR BEST CUSTOMERS

TO PARAPHRASE NAPOLEON THE PIG'S FAMOUS RULE in George Orwell's classic "Animal Farm": All bank customers are equal, but some customers are more equal than others.

That line probable best summarizes the results of a recent bank profitability distribution study done by the First Manhattan Consulting Corp., New York.

According to Utah banker Phil Hudson, whose bank was included, the study shows:

Generally, 20 percent of households represent the bulk (80-90 percent) of a bank's profitability.

This 20 percent, which encompasses all income levels, is subsidizing the rest of your customers.

"Between 50-60 percent of your customers are a burden; they're unprofitable. They're absorbing costs and they're not providing enough revenue to offset that cost," says Hudson, who advocates finding ways to develop their potential profitability.

The results of the First Manhattan Consulting Corp.'s study mirror many others done by banks of all sizes throughout the country, including a five-year examination of his own holding company, says Hudson, EVP, First Security Bank, Salt Lake City.

The data from those studies underline the need for community bankers to do a better job of allocating their resources to focus on the most profitable customers and increase their share of those "A" customers' wallets, he says.

Appendix B

Saying that 20 percent of bank customers account for 80 percent of the profits may even understate the situation, consultant Robert Hall told the ABA/BMA National Conference for community bankers in Orlando, Fla.

"In over 7,000 market analyses, we consistently find that 3 to 5 percent of the customers are generating half of the profits," says Hall, CEO, ActionSystems Inc., Dallas, and author of "The Streetcorner Strategy for Winning Local Markets."

Knowing who those customers are and building a fence around them is critical, Hall says.

"We have found . . . that on average in a local trade area the ability to do a better job of targeting your profitable customers and your high potential customers and direct more effort toward them is worth somewhere around $75,000 to $90,000 per local branch," he adds.

How do you determine who those high-profit customers are at your bank?

That capability is available at reasonable costs even at the smallest banks, Hudson says.

"There are a number of vendors who will accept [customer data] tapes and do a profitability study for you," he says.

Hudson adds that the pricing of marketing customer information file systems — MCIFs — also has dropped, and says their potential payoff is immense.

Appendix B

The problem with trying to identify your most profitable customers without outside help or an MCIF is that traditional segmentation schemes such as age, education and income demographics are not reliable.

"Upscale customers aren't necessarily the most profitable. There are as many upscale customers in the unprofitable [customer segments] as the profitable ones," Hudson says.

In fact, all income levels are found in both the profitable and unprofitable segments, he says.

ATTITUDES AND BEHAVIORS

There are, however, distinctive attitudes and behaviors that seem to identify profitable customers:

- Such customers tend to keep a lot of money in the bank.

"If you don't have an MCIF, you can use deposits as a proxy for profitability," Hudson says.

"The top 20 percent probably will represent close to 90 percent of your deposit base in almost every one of your deposit products."

- They're not intense investors and do not follow the stock market carefully.

- They're usually not detail-oriented money managers. In Hudson's institution, there seems to be a high correlation between profitability and people who don't reconcile their checking accounts, he says.

• Lifecycle events such as saving for retirement and setting up college funds also seem to be reliable profitability indicators, Hudson adds.

CHANNEL SURFING

First Manhattan's research also shows that delivery channels are related to profitability:

• Self-service customers — They do not use branch services. They account for about 10 percent of the customer base, 20 percent of the profits and 5 percent of the expenses.

• Mixed channel users — They use all channels — including the branch, the ATM and telephone — and account for about 50 percent of the customer base, 20 percent of the profits and 65 percent of the expenses.

• Branch-only users — They account for 40 percent of the customer base, 60 percent of the profits and 30 percent of the expenses.

IMPLICATIONS

Hudson and others say the First Manhattan study and similar examinations of customer profitability have several implications:

• Pricing — Product distribution expenses should be factored in to determine what products really cost.

For example, low-profitability households — particularly the bottom 20 percent — have inordinately high transaction levels and relatively low balances.

"I envision a pricing scheme where we charge certain people for ATM use beyond a certain number and telephone use beyond a certain number," Hudson says.

• Cross-selling — Since profitable users of one product are likely to be the profitable users of others, community banks should — instead of trying to sell everybody everything — focus cross-selling efforts on profitable customers.

"About 50-60 percent of all the cross-selling we're initiating in the bank is creating more burden than value. In some institutions 80 percent of the cross-selling activity is unprofitable," Hudson says.

• Advertising — Mass-media bank advertising that sells to the general public should be switched to more targeted tactics such as direct mail.

• Branch elimination — "Many high-profit households are branch-wed. So as we begin thinking about doing away with the branch or eliminating branch services, we need to be very thoughtful and very careful," Hudson says.

• Customer-service surveys — Surveys should be coded according to the level of profitability — top 20 percent, middle 30, lower 50 — giving more-profitable customers' forms higher value or more votes.

Hudson stresses that he is not suggesting that low-profitability customers be driven from the bank.

"What we're going to do is find alternative products and services that either encourage more revenue, or require less expense to serve these customers," he says.

Appendix B

SERVICE LEVELS

Community banks should maintain 100 percent quality service for everyone, but "we have to think about what we can do to improve our levels of service for our most profitable customers," Hudson says.

Simple things help:

• Give them a special telephone number to call your service center and talk to highly trained people.

• Use a laptop computer to bring bank services to their homes, suggests Lance Kessler, SVP and marketing director, Keystone Financial Inc., Harrisburg, Pa.

• Send thank-you notes and occasionally call to inquire if they're satisfied with the bank's service.

Says Hudson: "What we need to do is take the time and investment to better understand the profitability of our customers, how they use our services, how they use our products — so that we can be more intelligent identifying those segments we want to continue focusing our efforts on."

BY PATRICK DALTON

Supreme Court, U.S.
FILED
JUL 11 1997
OFFICE OF THE CLERK

Nos. 96-843 & 96-847

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NATIONAL CREDIT UNION ADMINISTRATION,
Petitioner,
and
AT&T FAMILY FEDERAL CREDIT UNION and
CREDIT UNION NATIONAL ASSOCIATION, INC.,
Petitioners,
v.
FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* INDEPENDENT BANKERS ASSOCIATION OF AMERICA AND AMERICA'S COMMUNITY BANKERS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether banks (and their trade associations), as competitors of Federal credit unions like AT&T Family Federal Credit Union ("AT&T FCU"), fall within the zone of interests to be protected by the Federal Credit Union Act ("FCUA"), and therefore have standing to challenge the National Credit Union Administration's ("NCUA's") violation of the "common bond" requirement of the FCUA.

2. Whether the NCUA's approval of a Federal credit union like AT&T FCUA's expansion of membership to the employees of multiple organizations, who have no common bond uniting all of them, violates the FCUA's express requirement that Federal credit union membership be limited to "groups having a common bond."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

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NATIONAL CREDIT UNION ADMINISTRATION,
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and

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Petitioners,

v.

FIRST NATIONAL BANK & TRUST CO., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

BRIEF OF *AMICI CURIAE* INDEPENDENT BANKERS ASSOCIATION OF AMERICA AND AMERICA'S COMMUNITY BANKERS IN SUPPORT OF RESPONDENTS

Amici curiae the Independent Bankers Association of America ("IBAA") and America's Community Bankers ("ACB") jointly submit this brief in support of respondents, First National Bank & Trust Company, *et al.* This

brief is filed with the consent of all parties, which are on file with the Court.[1]

INTERESTS OF *AMICI CURIAE*

IBAA is a non-profit national trade association that exclusively represents the interests of the nation's community banks. The IBAA's nearly 6,000 national and state chartered member financial institutions are located in all 50 states and in the District of Columbia. IBAA members engage in all forms of lending to businesses and consumers.

ACB is the national trade association for 2,000 savings and community financial institutions and related business firms. The savings industry has more than $1 trillion in assets, 250,000 employees and 15,000 offices. ACB members have diverse business strategies based on consumer finance, housing, and community development.

Amici curiae jointly submit this Brief in order to express the support among the financial institutions they represent, for the respondents' challenge to the NCUA's action loosening restrictions on Federal credit union membership, and to emphasize the importance of this case to the entire financial services industry and to community banks and savings institutions in particular.

The members of IBAA and ACB are community-based, full service financial institutions. Their customers are individuals, small employers, college students, farmers, and others like them who are well and adequately served by these institutions. The NCUA, AT&T FCU and the many *amici* who have appeared on behalf of the credit union industry, argue that unless the Court reads the plain language of the statute to permit multi-employer groups to affiliate, employees of small businesses and other individuals will be denied access to comparable financial institu-

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

tion services. Nothing could be further from the truth. All financial institutions, including credit unions, operate in a fiercely competitive marketplace, to the benefit of consumers who have a variety of products and services to choose from. Brokerage firms, mutual funds, insurance companies, banks, savings institutions and credit unions all compete for the same customers. Permitting credit unions to serve multiple unaffiliated groups has an enormous competitive impact on these other providers of financial services.

Credit unions originally were founded by individuals for the collective good of themselves and their neighbors who may not have had equal access to the banking system at the time. The common bond requirement—adopted to restrict credit unions to serving a small, local and well-defined group of members—was the glue that bound credit union members together in a cooperative venture.

However, credit unions that historically served such well-defined local groups, such as employees of a single company, now have been allowed to expand their charters to permit them to serve much of the general public over a wide geographic area. Credit unions have been allowed, indeed encouraged by the NCUA, to include under one umbrella an unlimited number of unrelated membership groups. Huge financial organizations, like AT&T FUA with its 150,000 customers and reported 560 subgroups, bear no resemblance to the credit unions authorized by Congress in the FCUA.

Since the late 1970's, credit union powers have been gradually and significantly expanded so as now to permit credit unions to offer the same range of consumer lending products, accounts, and services as banks and savings institutions to the same general population of consumers. It is important to note that as the authority of credit unions has changed and expanded, the traditional types of credit union customers also have changed and expanded. Today, the segments of the local community served by credit

unions are indistinguishable from those served by banks and savings institutions. Credit union customers are no longer primarily drawn from lower income groups. In 1995, the average U.S. household income was $36,740; the average household income for credit union members was $43,480. Seventy percent of credit union members owned or were buying homes in 1995. By comparison, only 62 percent of nonmembers owned homes. CUNA & Affiliates, Credit Union National Association, Inc., *National Member Survey*, at 10-11 (1996); *see also* General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 231 (1991) ("There is no evidence that today's credit union members are for the most part 'of small means.'"). "The U.S. credit union industry has evolved from serving simple, short term consumer savings and lending needs, to being full-service consumer banks." A. K. Moysich, *An Overview of the United States Credit Union Industry*, FDIC Banking Review, Fall 1990, Vol. 3, No. 1, at 25 (1990). And, according to 1995 NCUA statistics, credit unions, compared to banks and savings associations, are the most likely to deny loan applications from low-income minorities. Of all loan denials by credit unions, 97.2% were from low-income minorities, compared with denials of 2.8% to low-income whites and Asians. *CUs Rated Worst Lenders to Minorities*, NCUA Watch (American Banker, Inc., Washington, D.C.) Oct. 21, 1996, at 1, 3.

Unlike full-service banks with whom credit unions now compete, however, credit unions are exempt from federal, state and local taxes on their income. This confers on credit unions a financial advantage averaging $.71 per $100 in deposits nationwide. For a typical $100 million community bank, this differential equates to a $710,000 annual financial competitive advantage for credit unions. This allows credit unions to accumulate additional capital to support asset growth, and their lower cost of funds allows them to pay higher interest rates on deposits and to charge lower interest rates on loans.

Unlike full-service banks, credit unions also are exempt from bank regulatory requirements like the Community Reinvestment Act ("CRA"). 12 U.S.C. § 2901 *et seq.* When Congress adopted CRA in 1977, it exempted credit unions because they were small institutions with a small amount of assets serving a small number of customers, and they had significant field of membership restrictions in place. However, today many credit unions are major financial institutions with tens of thousands of members and no practical restrictions on membership growth. A growing number of credit unions in recent years have dramatically increased their involveemnt in housing finance, becoming important players in the mortgage market, instead of relying on smaller balance consumer loans. According to the NCUA, credit union real estate loans in 1995 totaled $62.9 billion, or 32 percent of total loans. Search of Sheshunoff Information Services, Inc., Credit Unions, CD ROM (Dec. 1996). Credit unions made $8.37 billion in first mortgages in the first six months of 1996, more than double the $4 billion they made in the first half of 1995. And, as noted above, have a very poor record of minority mortgage lending. Jo McIntyre, *Boom in Mortgage Lending at CUs*, National Mortgage News (Faulkner & Gray, Inc., New York, NY) Oct. 21, 1996 at 1. Although credit unions currently function in a community like a bank or savings institution, they are not required to meet similar community investment standards.

Credit unions were established by Congress to permit individuals with a common employment or community bond to create limited purpose financial institutions to serve them and their common interests, and were given special tax and regulatory exemptions to assist them in furthering this goal. Congress did not intend to authorize multi-state, multi-billion dollar, tax-privileged, full-service financial institutions to unfairly compete with private financial institutions for customers in the general population. In section 109 of the FCUA, 12 U.S.C. § 1759, Congress spoke directly and precisely to this limitation by

imposing the "common bond" requirement, which now must be enforced.

SUMMARY OF ARGUMENT

Amici agree with the arguments made and authorities cited by respondents in support of respondents' standing, and with respect to the unlawfulness of the NCUA's actions.

The court of appeals properly held that respondents, as competitors of credit unions, have standing to challenge the NCUA's action approving the expansion of the membership of a Federal credit union to include innumerable, wholly unrelated groups. Pet. App. 26a.[2] The court of appeals' decision represents a straightforward application of the zone of interests test as this Court has applied it in a line of cases holding that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference v. American Postal Workers Union*, 498 U.S. 517, 529 (1991) (citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987); *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)). In light of those precedents, the court of appeals' decision was correct.

The court of appeals' analysis of standing follows this Court's explanation of the zone of interests test. As the Court stated in *Clarke*, a plaintiff is not required to show that there was a "congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400. Thus, the court of appeals correctly reasoned that a plaintiff may have standing, even if the plaintiff is not the "intended beneficiary" of the statute at issue. Respondents' standing turns on whether respondents are members of a particular class of plaintiffs that Congress intended to be relied upon to challenge agency disregard of the law.

[2] References to "Pet. App." refer to NCUA Pet. No. 96-843.

Id. at 399. Persons that Congress intended to rely upon to challenge agency actions may fairly be described as "suitable challengers," as the court of appeals used that term. The court of appeals' reasoning thus is fully supported by this Court's jurisprudence on standing.

On the merits, the court of appeals properly applied the analysis specified in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to hold that NCUA's action was not in accordance with the FCUA. Pet. App. 2a. The plain language of section 109 of the FCUA, 12 U.S.C. § 1759, clearly conveys Congress' intent that all of the members of a Federal credit union share a single common bond. The legislative history of the FCUA and congressional and administrative statements made after the FCUA's passage further confirm the court of appeals' finding that the plain meaning of the statutory language prohibits a credit union's membership from being comprised of amalgams of wholly unrelated groups. The decision of the court of appeals therefore should be affirmed.

ARGUMENT

I. BANKS (AND THEIR TRADE ASSOCIATIONS), AS COMPETITORS OF FEDERAL CREDIT UNIONS LIKE AT&T FCU, FALL WITHIN THE ZONE OF INTERESTS TO BE PROTECTED BY THE FEDERAL CREDIT UNION ACT ("FCUA"), AND THEREFORE HAVE STANDING TO CHALLENGE THE NATIONAL CREDIT UNION ADMINISTRATION'S ("NCUA'S") VIOLATION OF THE "COMMON BOND" REQUIREMENT OF THE FCUA.

A. Respondents Have Standing To Challenge The NCUA's Action Under The Well Settled Zone Of Interests Test.

There is no dispute in this case that the respondents have suffered injury in fact as a result of the NCUA's grant of applications for expanded membership to un-

related occupational groups by AT&T FCU and other federal credit unions, and therefore satisfy the Article III standing requirement. Pet. App. 20a. However, Petitioners contend that the banks cannot claim prudential standing because they fail to qualify as a party "adversely affected by agency action within the meaning of the relevant statute." 5 U.S.C. § 702. As shown below, however, the respondents clearly satisfy the test for prudential standing to challenge the NCUA's actions.

A party meets the requisite standard for prudential standing if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). This Court further articulated the "zone of interests" analysis in *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388 (1987), explaining, "The essential inquiry is whether Congress 'intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.'" *Clarke*, 479 U.S. at 399 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (alterations in original)). The Court did state that in cases such as the instant case, where the plaintiff is not itself the subject of the contested regulatory action, the plaintiff lacks standing if its interests "are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. The Court expressly noted, however, that "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400 (citing *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971)).

Indeed, *Clarke* was simply one case in a "series of cases" in which this Court has held that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference v. American Postal Workers*

Union, 498 U.S. 517, 529 (1991) (citing *Clarke*, 479 U.S. 388; *Investment Co. Institute*, 401 U.S. 617; *Association of Data Processing Serv. Orgs., Inc.*, 397 U.S. 150). In *Clarke*, securities firms had standing to challenge the Comptroller of the Currency's ruling that national banks could operate out-of-state brokerage offices. In *Investment Co. Institute*, an association of mutual fund companies had standing to challenge the Comptroller of the Currency's decision that a bank could establish and operate a collective investment fund for managing agency accounts. In *Data Processing*, data processors had standing to challenge the Comptroller of the Currency's decision that national banks could make data processing services available to their customers.

The Court also could have cited *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970). In that case, travel agents had standing to challenge the Comptroller of the Currency's decision that banks could provide travel services to customers. *See also Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin.*, 822 F.2d 1105, 1009 (D.C. Cir. 1987) (the court observed that "[c]ompetitors have a seemingly unbroken record of success in securing standing to challenge decisions involving agency licensing").

The instant case represents yet another challenge by competitors to a regulatory agency's decision in violation of the law limiting the activities of its regulated entities. The banks—competitors of the regulated entity AT&T FCU and other similarly situated federal credit unions—here challenge the NCUA's regulatory action as a violation of the statutory common bond requirement. The court of appeals correctly observed that the parallels between the banks' challenge in this case and the *Investment Co. Institute* and *Clarke* cases "are striking." Pet. App. 32a. Under the unbroken line of precedents recognized in *Air Courier Conference*, the respondents have

standing to bring this action. *Air Courier Conference*, 498 U.S. at 529.

Petitioners have cited only one case in which competitors of a regulated entity have been denied standing to challenge action by the regulatory agency harming their interests. Brief for the National Credit Union Administration ("NCUA Brief") 19 (citing *Branch Bank & Trust Co. v. NCUA*, 786 F.2d 621 (4th Cir. 1986), *cert. denied*, 479 U.S. 1063 (1987)); Brief for Petitioners AT&T Family Federal Credit Union and Credit Union National Association, Inc. (AT&T FCU Brief) 24-25 (citing *Branch Bank*). However, the court of appeals in this case properly concluded that *Branch Bank*, which was decided before *Clarke*, no longer has persuasiveness after *Clarke*. Pet. App. 24a n.3. Indeed, *Branch Bank* was inconsistent with the already settled precedent of this Court in that it failed to recognize that competitors of a regulated entity have standing to challenge the regulatory agency's loosening of restrictions. *See Investment Co. Institute*, 401 U.S. 617; *Arnold Tours*, 400 U.S. 45; *Data Processing*, 397 U.S. 150.

The cases chiefly relied upon by petitioners to support their argument that the respondents here do not meet the "zone of interests" test are clearly distinguishable from the instant case because they concerned challenges by plaintiffs whose interests were at best only marginally related to the purposes of the statute at issue. In *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), the Court explained the scope of the zone of interests test by hypothesizing an action brought by a court reporter service challenging an agency's failure to conduct statutorily required hearings on the record. The Court stated that in such a case the court reporter service would lack standing, since the provision was meant to protect the interest of the parties to the proceeding. *Lujan*, 497 U.S. at 883. In *Air Courier Conference*, the Court held that

Postal Service employees did not have standing to challenge Postal Service regulations authorizing international remailing, which would have the effect of reducing work for the Postal Service employees. *Air Courier Conference*, 498 U.S. 517 (cited in NCUA Brief, at 24). Importantly, neither of these cases involved challenges by a competitor to agency decisions with respect to a regulated entity, and therefore are wholly irrelevant. Under controlling Court precedent in "strikingly similar" cases, respondents in this case are within the zone of interests to be protected by the FCUA and therefore have standing to challenge the NCUA's action.

B. The Court Of Appeals' Holding That The Banks And Their Trade Associations Have Standing Correctly Applies This Court's Decisions On Standing.

Petitioners assert that the court of appeals erred in concluding that the respondents, as competitors to credit unions, have standing because it referred to them as "suitable challengers." NCUA Brief 15. As discussed above, the court of appeals' holding that respondents have standing is mandated by established precedent of this Court applying the zone of interests test first articulated in *Data Processing*. Moreover, the specific route by which the court of appeals reached its conclusion, and its discussion of the "suitable challenger" analysis in this case, is wholly consistent with this Court's explanation of the prudential standing analysis.

The court of appeals' opinion refers to the suitable challenger analysis elaborated in a prior case. *See Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989) (*HWTC IV*). In *HWTC IV*, the court held that a party may satisfy the zone of interests test either by being one of the intended beneficiaries of a statute or by having interests that coincide with the protected interests, *i.e.*, being a "suitable challenger." *HWTC IV*, 885 F.2d at 922. In this case, the court of appeals

found that respondents were suitable challengers, using *HWTC IV's* term, because this Court's decisions have made clear that competitors are suitable plaintiffs to challenge a regulatory decision applying market-defining statutes such as the one at issue here. Pet. App. 31a-37a.

The court's analysis is consistent with the zone of interests test. This Court's statement in *Clarke* that the essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law compels application of the suitable challenger analysis. *See Clarke*, 479 U.S. at 399 (quoting *Block*, 467 U.S. at 347). Moreover, the development and application of the suitable challenger analysis is appropriate in light of the line of cases holding that "competitors of regulated entities have standing to challenge regulations." *Air Courier Conference*, 498 U.S. at 529. The court of appeals properly derived from that statement and the line of cases upon which it relies the principle stated in the opinion below:

> a plaintiff who has a competitive interest in confining a regulated industry within certain congressionally imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.

Pet. App. 33a.

Petitioners advance an improperly cramped view of the zone of interests test in asking the Court to reject the court of appeals' suitable challenger analysis. Petitioners argue that unless the banks' interests were specifically intended to be protected by Congress, the banks cannot meet this test. Citing *Bennett v. Spear*, 520 U.S. ——, 117 S. Ct. 1154, 1167, 137 L. Ed. 2d 281 (1997), NCUA argues that respondents must "demonstrate that Congress intended to protect the plaintiff's commercial interests in the statutory provision, the violation of which formed the

legal basis for the complaint." NCUA Brief 23. The statement quoted from *Bennett*, however, simply *describes the court's holding in Data Processing*, stating that Congress' intent to protect the complainants' commercial interest in that case was "sufficient" to satisfy the zone of interests test. *Bennett*, 117 S. Ct. at 1167. The statement does not purport to *prescribe a new test* to replace the established zone of interests test. The isolated statement in *Bennett* seized upon by the petitioners is wholly insufficient to challenge the court of appeals' analysis. Indeed, in *Bennett*, the Court held that ranchers were within the zone of interests to be protected in the section of the Endangered Species Act requiring agency decisions to be based on the best scientific and commercial data available, and therefore had standing to bring their claim. *Bennett*, 117 S. Ct. 1154.

The case in which this Court first enunciated the zone of interests standard, *Data Processing*, affords the better basis for considering the meaning of that test. The Court in that case held that standing turns on "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. 153. The "*zone* of interests to be protected" clearly encompasses more than only the specifically intended beneficiaries of a statute, as indicated by the word "zone," and the plural "interests." As stated in *Clarke*, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke*, 479 U.S. at 399-400 (citing *Investment Co. Institute*, 401 U.S. 617). The "suitable challenger" vocabulary developed and applied by the court of appeals appropriately describes those plaintiffs, like the respondents here, who have interests within the "*zone* of interests to be protected," beyond those entities that Congress intended to benefit.

II. THE NCUA'S APPROVAL OF A FEDERAL CREDIT UNION LIKE AT&T FCU'S EXPANSION OF MEMBERSHIP TO THE EMPLOYEES OF MULTIPLE ORGANIZATIONS, WHO HAVE NO COMMON BOND UNITING ALL OF THEM, VIOLATES THE FCUA'S EXPRESS REQUIREMENT THAT FEDERAL CREDIT UNION MEMBERSHIP BE LIMITED TO "GROUPS HAVING A COMMON BOND".

A. Congress Clearly Intended That Members Of A Federal Credit Union Share A Single Common Bond.

The decision in this case turns on the interpretation of Section 109 of the FCUA, enacted by Congress in 1934 to govern the chartering and regulation of Federal credit unions. 12 U.S.C. § 1759. Section 109 provides:

> Federal credit union membership shall consist of the incorporators and such other persons and incorporated and unincorporated organizations, to the extent permitted by rules and regulations prescribed by the [NCUA] Board, as may be elected to membership and as such shall each, subscribe to at least one share of its stock and pay the initial installment thereon and a uniform entrance fee if required by the board of directors; *except that Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.*

12 U.S.C. § 1759 (italics and underscoring added). The critical phrase to be interpreted in that statutory provision is "groups having a common bond." The court of appeals correctly held that "the FCUA requires by its terms that all members of a credit union share a single common bond." Pet. App. 9a.

Judicial review of an agency's construction of a statute in an action under the Administrative Procedure Act, 5 U.S.C. § 706, is governed by the well settled rules established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first question to be addressed is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Where Congress' intended meaning is clear, the Court's inquiry is at an end. In this case, as the court of appeals correctly held, Congress directly spoke to the precise question at issue and stated in the FCUA that the members of a Federal credit union must share one bond.

That conclusion is mandated by the plain language of the statute. The statute's phrase "a common bond" means what it says: one common bond. The court of appeals reached this conclusion, advanced by the respondents, by an alternative route, reasoning that the word "groups" in the statute implies a common bond among the members of the groups. Pet. App. 6a-7a. Both lines of reasoning support the conclusion that all members of a Federal credit union must have a common bond.[8] The existence of more than one reason compelling that same interpretation indicates that Congress' intent is abundantly clear. It does not, as petitioners contend, in any way suggest ambiguity in the language. The plain language of the phrase shows that Congress spoke directly to the precise question at issue here.

In addition to the express language of the phrase "groups having a common bond," the plain language of the subsequent parallel phrase "groups within a well-defined neighborhood, community, or rural district" further compels the conclusion that all of a Federal credit union's members must be united by a single common bond. Despite the virtually identical language and structure of the phrases "groups having a common bond" and "groups

[8] The question of whether a Federal credit union may have a membership composed of several groups all of whose members share a single common bond is not before the Court. NCUA approved AT&T FCU's expansion to include groups whose members are conceded to lack a single common bond.

within a well-defined neighborhood, community, or rural district," the NCUA has adopted different rules covering the two sections. The NCUA's regulations implementing the geographic limitation on membership require that all members of the Federal credit union live, worship, or work in "a single, geographically well-defined area where residents interact." 59 Fed. Reg. 29,066, 29,077 (1994). In a separate challenge to NCUA's interpretation of section 109 of the FCUA, the Court of Appeals for the Sixth Circuit found the common bond and the geographic limitation "share the same syntactical structure [and] ought to be interpreted consistently." *First City Bank v. NCUA*, 111 F.3d 433, 438 (6th Cir. 1997) (striking down the NCUA's interpretation of section 109). The court of appeals likewise correctly found that the same phraseology used in the statute cannot sensibly be read to mean two different things.

Respondent NCUA tries in vain to justify the contradictory readings of similar language in the same sentence of the statute by drawing a distinction between the participial phrase "having a common bond" and the prepositional phrase "within a well-defined neighborhood, community, or rural district." It is, however, a distinction without a difference. NCUA incorrectly contends that the participial phrase is merely "an example of a noun being *described*," while the prepositional phrase "*imposes a limit* on the noun." NCUA Brief at 31 (emphasis added). Participial phrases immediately following nouns without being set off by commas are "restrictive," and thus impose a limit on the noun to which they refer, just as do prepositional phrases. William Strunk, Jr. & E.B. White, *The Elements of Style* (3d ed. 1979).

NCUA goes so far as to state that "[i]n selecting a participial phrase to serve as the adjective to a plural noun, Congress necessarily created ambiguity." NCUA Brief at 32 n.12. Participial phrases do not suffer from that inherent defect, however. *The King's English*, cited

by NCUA, NCUA Brief at 31 n.11, does not suggest that participial phrases are necessarily ambiguous when referring to plural nouns. *See* H.W. Fowler & F.G. Fowler, *The King's English* (3d ed. 1931). That work discusses examples of the misuse of participial phrases due to the absence of or disagreement with the noun referent. The frequency of such "blunders" in English usage is irrelevant to the issue in this case, since the phrase, "groups having a common bond," properly links the participial phrase to the noun "groups."

It would have been possible for Congress easily to indicate clearly that several groups could form the membership of a Federal credit union without having a single common bond uniting all members if that had been Congress' intent. The simple phrase "groups having common bonds" might better support a reading of the statute that NCUA currently advances. Similarly, the language used by the NCUA in its 1989 revision of its field of membership policy includes clear language stating that "[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond. . . . The group's common bond need not be similar to *the common bond(s)* of the existing Federal credit union." 54 Fed. Reg. 31,168 (1989) (emphasis added) (cited in NCUA Brief at 8). NCUA's construction of the statutory phrase "a common bond" to mean "the common bond(s)" is patently inconsistent with the clearly expressed intent of Congress.

Petitioners' arguments focus only on the minutiae of the phrases in the statute, without taking into consideration whether Congress could have intended the statute to mean what NCUA now interprets it to mean. If section 109 of the FCUA requires only that each group have its own common bond, any limitation on Federal credit union membership would be illusory. Under petitioners' reading, the statute would permit a credit union to offer membership to every person in the United States who has a job,

if the credit union simply went through the process of listing every employer. Such a reading of the statute would make the common bond requirement meaningless.

The legislative history of the FCUA supports the court of appeals' interpretation of the plain language of the statute. Congressional statements concerning the purpose of the common bond requirement establish that Congress intended that the members of each Federal credit union be united by a single common bond. The Senate Banking Committee's report on the FCUA reveals the congressional definition of a credit union:

> A credit union is a cooperative society, organized in accordance with the provisions of a specific credit-union law, carefully supervised, self-managed, *limited in each case to the members of a specific group with a common bond of occupation or association* (such as the employees of a given industry, farmers in a given district, members of a church parish, employees of the United States Government, groups within a well-defined neighborhood, small community or rural district, etc.) . . . .

S. Rep. No. 555, 73d Cong., 2d Sess. 2 (1934) (emphasis added).

In addition, the bill's sponsor, Senator Sheppard, made statements during passage of the FCUA that support the court of appeals' interpretation of the statute. Senator Sheppard supplied an accompanying statement to S. 1639, which ultimately became the FCUA, that defined a credit union as "organized within and in each case limited to a specific group of people." 77 Cong. Rec. 3206 (1933). Similarly, during debate of the bill, he explained that "[c]redit unions are organizations of working people which enable members of a given group to have money . . . which is loaned to members of the individual group for provident purposes at normal interest rates." 78 Cong. Rec. 7259 (1934).

The legislative history of the FCUA makes it clear that Congress intended to establish Federal credit unions along the lines of credit unions as they had developed in a number of states. A credit union was a cooperative, owned and managed by members united in a common bond of association, occupation, or community. *See* J. Carroll Moody & Gilbert Fite, *The Credit Union Movement* (1971). Credit unions were not composed of numerous different groups unrelated by any single bond.

Further light on the contemporary understanding is shed by testimony to Congress by Roy F. Bergengren, the drafter of a model credit union act upon which the FCUA's common bond provision was based. His testimony is especially persuasive as to the meaning of the common bond requirement, since the NCUA itself has stated that Congress accepted Mr. Bergengren's views, and that the FCUA's use of the phrase common bond "embodied more or less Mr. Bergengren's description." National Credit Union Administration, *Studies in Federal Credit Union Chartering Policy* § II, at 12, 13 (July 1979). In his testimony to Congress, Mr. Bergengren described a credit union as "a cooperative bank, organized within and limited to a specific group of people." *Credit Unions: Hearings on S. 1639, S. 1640, S. 1641 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 73d Cong., 1st Sess. 31 (1933). *See also id.* at 15 ("every credit union is organized within a limited and given group of people"). The legislative history thus indicates that Congress intended that all the members of a credit union must share one common bond.

The intent of the common bond requirement as expressed in the legislative history of the FCUA makes it clear that the same common bond must apply to all members of a credit union. The legislative history of the FCUA clearly conveys that Congress saw the cooperation between members of a credit union as one of the most important distinctive attributes of credit unions. Credit

unions were intended to bring credit resources to the masses "on a cooperative basis." S. Rep. No. 555, 73d Cong., 2d Sess. 3 (1934). *See also* H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934). Credit unions' ability to weather the storm of the Great Depression was attributed to their democratic control, honest management and "the worth of cooperative credit" generally. S. Rep. No. 555, 73d Cong., 2d Sess. 2-4 (1934). Congress believed that because of the cooperative nature of credit unions, they, unlike banks, could "loan on character." 78 Cong. Rec. 7259, 12,223 (1934) (statement of Rep. Luce).[4]

The existence of a single common bond uniting all the members of a Federal credit union is essential to promote cooperation between members. Credit unions with membership of wholly unrelated, disparate, and even competing, groups would not enjoy the cooperation of members that Congress saw as a defining element of credit union membership. The NCUA's approval of Federal credit union's expansion of membership to include unrelated groups does not merely ignore Congress' intent, but effectively flouts it. It is wholly unreasonable to believe that Congress could have intended to foster establishment of credit unions on a cooperative basis, while permitting membership to include groups having no reason to cooperate with one another.

Amicus curiae National Association of Federal Credit Unions in support of petitioners urges, however, that the Court should construe the FCUA to permit a credit union to include members lacking a single common bond, because, otherwise, individual credit unions would lack "the diversity in membership necessary to minimize risk and avoid the

[4] Congress' emphasis on cooperation among the members of a Federal credit union was reconfirmed by subsequent statements of Congress. *See* S. Rep. No. 814, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2784 (the Senate Banking Committee stated, "Federal credit unions are cooperative associations [whose] membership is limited to a group of persons having a common bond of association, occupation, or residence").

adverse effects of a downturn in the business affairs of a single underlying company or business." Brief of *Amicus Curiae* National Association of Federal Credit Unions in Support of Petitioners ("NAFCU Brief") 27. That argument seeks to turn congressional intent completely on its head and reveals the basic contradiction at the heart of all of the petitioners' arguments. The legislative history nowhere evidences an intent by Congress to foster *diversity* among a single Federal credit union's members. As explained above, Congress plainly saw the *unity* of credit union members as the unique strength that had permitted credit unions to survive the Great Depression (which certainly occasioned a downturn in the business affairs of not a few companies). *E.g.* S. Rep. No. 555, 73d Cong., 2d Sess. 2-4 (1934); H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1-2 (1934).

Whatever the advisability of fostering diversity among a credit union's membership, that is a decision for Congress to make. Congress in fact decided against it as expressed clearly in the language of the FCUA's common bond requirement. The court of appeals noted that NCUA's purpose in its 1982 rule change was "to enable each [Federal credit union] to realize economies of scale and *to facilitate occupational diversification* within the ranks of its membership." Pet. App. 4a (citing Letter to Fernand J. St. Germain dated October 28, 1983 from E.F. Callahan, Chairman, National Credit Union Administration 8-9, Joint App. 44). However, the NCUA's decision to foster diversity among the membership of each Federal credit union impermissibly violates Congress' express command that the membership of each Federal credit union must be united by a common bond. Indeed, there is no evidence that Congress intended to authorize the establishment of any Federal credit union that lacked the essential, defining attribute of a single common bond uniting all members within a single group of people. Nowhere in the legislative history of the FCUA is there a reference to any credit union composed of unrelated groups of mem-

bers. The legislative history instead compels the conclusion that the statute means what it says, all members of a Federal credit union must share one common bond.

B. Congressional And Administrative Statements Over Five Decades Confirm That The FCUA Requires That The Members Of A Federal Credit Union Must Have A Single Common Bond.

For nearly fifty years, the NCUA consistently interpreted the FCUA to require that all the members of a Federal credit union be united by a single common bond. *E.g.*, 45 Fed. Reg. 8280, 8285 (1980); *see also* General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 219 (1991). In seeking to understand statutory language, it is customary to attend to the construction adopted by the agency administering that statute promptly after its enactment. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 648 n.26 (1978); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 314-15 (1933). The long-standing constructions, adopted by the NCUA's predecessor regulator prior to the 1982 policy change, clearly supports the respondents' position. It should further be noted that when the NCUA adopted its new policy in 1982, it provided no explanation for its decision to change its interpretation of the statute. *See* 47 Fed. Reg. 16,775 (1982). However, the NCUA's chairman conceded at the time that the multiple common bond policy represented "the most significant deregulation" of credit unions because it allowed economic diversification. General Accounting Office, *Credit Unions: Reforms for Ensuring Future Soundness*, at 57 (1991).

Congress has never wavered in its interpretation that section 109 of the FCUA requires a single common bond among all the members of a Federal credit union. Rather, Congress has on numerous occasions expressly reaffirmed its intent that Federal credit union membership be limited

to members sharing one common bond. In 1948, for example, the House Committee on Banking and Currency described Federal credit unions in the following terms: "Membership in a particular Federal credit union is limited to a group having a common bond of occupation, or association, or a group within a well-defined neighborhood, community, or rural district." H.R. Rep. No. 1791, 80th Cong., 2d Sess. 1 (1948), *reprinted in* 1948 U.S.C.C.A.N. 2172, 2172 Add. 583. Again, in 1959, the Senate Banking Committee stated, "Federal credit unions are cooperative associations . . . . Membership is limited to a group of persons having a common bond of association, occupation, or residence." S. Rep. No. 814, 86th Cong., 1st Sess. 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2784.

Even more recent statements by Congress are in accord with the consistently expressed interpretation of section 109 of the FCUA as requiring members of a Federal credit union to have a single common bond. *See* H.R. Rep. No. 23, 95th Cong., 1st Sess. 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 105, 110 (credit unions are organized around the concept of "people of close common interests joining together for the economic benefit of that group of persons"); S. Rep. No. 487, 94th Cong., 1st Sess. 8 (1975) ("[c]redit unions are distinguished from other depository institutions by the common bond of their customers. Credit unions serve individuals who are affiliated by a 'common bond' of employment . . . ."); S. Rep. No. 1265, 90th Cong., 2d Sess. 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2469, 2470 ("[n]o individual may belong to a credit union or borrow from a credit union unless he is within the common bond concept of that credit union"). Taken together, these statements represent a long tradition of congressional understanding that the common bond requirement means all members of a Federal credit union must share a single common bond.

In light of that background, the fact that Congress has not moved to repudiate the NCUA's changed interpreta-

tion of section 109 of the FCUA cannot be read as supporting the NCUA's action. Congressional silence is an unreliable guide to congressional intent since, as this Court has stated, "Congressional inaction frequently betokens . . . preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969). The better guides to Congress' intent are the plain language of the statute, the contemporaneous legislative history, and the subsequent affirmative statements by Congress that it understands section 109 of the FCUA to require all members of a Federal credit union to share one common bond.

Because Congress' intent on the precise question at issue in this case is clear, the Court's inquiry is at an end. *Chevron*, 467 U.S. at 836-837. No deference is to be accorded to an agency's misunderstanding of Congress' unambiguously expressed intent.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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